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IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,
Appellant,

vs.

Jasper Thomason,
Appellee.

BRIEF FOR APPELLANT.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

WILLIAM STORY, JR.,
JOSEPH L. LEWINSON,
LAURENCE W. BEILENSON,
Solicitors for Appellant.

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STATEMENT OF FACTS.

May It Please the Court:

This is an appeal from two orders of the District Court for the Southern District of California, Southern Division. The first order quashed the service of subpoena on the defendant Jasper Thomason, appellee herein, and vacated the decree previously entered against said Jasper Thomason. [Tr. 320-322.] The second order refused to set aside the first order. [Tr. 333.]

This appeal is only one phase of a litigation extending over a period of seven years, and involving appellee Jasper Thomason's family, as well as himself. It arises out of a conspiracy conceived by H. F. Davis, Thomason's son-in-law and a member of the bar, to defraud appellant and appellant's assignor out of deeds of trust and mortgages held by appellant and its assignor on lands in Imperial county, California. The means chosen to effectuate the conspiracy were a fraudulent proceeding for registration of the title to the lands, aided by a false affidavit of service by Meryle Thomason Davis, H. F. Davis' wife, and Jasper Thomason's daughter. This was followed by a great number of conveyances and mortgages, in which appellee Jasper Thomason was one of the chief participants.

Appellee Jasper Thomason, H. F. Davis, and Meryle Thomason Davis were all defendants in the suit arising out of the fraudulent conspiracy. Meryle Thomason Davis was a witness at the trial. Davis fled to Mexico; Thomason was in parts unknown of Kern county, having evaded service of process as a witness.

The suit arising out of the fraud was begun on February 15, 1918. On that date Frances Investment Company, a corporation, plaintiff in the court below, appellant herein, filed its bill in equity against Friend J. Austin and others. [Tr. 4-87.] On January 23, 1920, plantiff filed its supplemental bill in equity, [Tr. 92-114], naming new defendants, among them Jasper Thomason, appellee herein, and adding new allegations. On April 5, 1920, plaintiff filed its amended supple-

mental bill in equity. [Tr. 122-148.] The details of these pleadings are not material on this appeal. It will be sufficient to state their general nature.

It was alleged that defendants Austin and wife executed promissory notes for $55,000 to Delta Land & Water Co. and a deed of trust and mortgage on lands in Imperial county, California, as security therefor. As further security the Austins assigned to Delta Land & Water Co. notes of Anna Marie Belford and of one, Carrick, secured by mortgages on Imperial county lands. Plaintiff became the holder of these notes and securities, buying them for a valuable consideration. Defendant H. F. Davis was the attorney for the Austins and Belfords. He conceived the plan of cheating plaintiff out of its security. He had the Austins and Belfords go through a fraudulent proceeding for registration of title, and by means of false affidavits of service on plaintiff and plaintiff's assignor (one of which was executed by Meryle J. Davis, H. F. Davis' wife and appellee Thomason's daughter) procured a decree registering the title in the Austins. The Austins and Belfords, together with H. F. Davis, their attorney, Meryle Davis, his wife, Jasper Thomason, her father, appellee herein, and others then conspired to dispose of the various parcels of land and conceal the proceeds. There were then many conveyances, mortgages, and reconveyances with intent to defraud plaintiff. Plaintiff by its prayers sought to reach the original security and its proceeds, and for deficiency decrees against the defendants. This is but a sketch of the

allegations of the bill, its supplement, and amendment, but sufficient we believe for the purpose of this appeal.

After a trial on the merits Judge Bledsoe made a final decree in favor of plaintiffs, fully sustaining plaintiff's allegations [Tr. 222-233], which decree among other things contained the following language:

"* * * and in that behalf it is found and adjudged that said defendants H. F. Davis and Jasper Thomason, together with the defendants Friend J. Austin and Lettie M. Austin and Meryle T. Davis committed all and singular the frauds charged against them in said bill of complaint, and said judgment is not made against said Meryle T. Davis because by inadvertence and mistake she was not served with process in said cause; and it is further ordered that said Special Master take all necessary and proper steps to fix the amount due under the terms hereof from said Jasper Thomason and H. F. Davis." [Tr. 228.]

It is with the service on Jasper Thomason, on which said decree was based as to him, that this appeal is concerned.

Thomason was served on May 13, 1921, by leaving a copy of the subpoena at his dwelling house with his daughter under Equity Rule 13. Although he nowhere denies full knowledge of the pendency of the suit, and although the record shows clearly that he must have known all about the suit, which was tried in October, 1923, he stood by and did nothing until April 15, 1925, when he appeared specially and moved to quash the service on him and to set aside the decree against him, because his daughter when served

was only seventeen years and four months old, and, as he claimed, was therefore not an "adult person" within the meaning of Equity Rule 13. Plaintiff contended that on a fair construction of Equity Rule 13 "adult person" meant "matured person," and that even if it did not, that the daughter served was of age, the one served being the married daughter, who was twenty-six. If the court was in doubt as to the facts, plaintiff asked an oral hearing. Moreover, plaintiff contended the marshal's return was conclusive, since it was complete and self-supporting on its face with territorial jurisdiction admitted; and that this was clearly so in view of the fact that Thomason was guilty of laches and was not seeking to defend but to defeat the jurisdiction of the court.

The deputy marshal's return had shown service on "Miss Thomason". He made affidavit that this was by inadvertence, and that he had served the married daughter of defendant, who, it is admitted, was twenty-six years of age at the time. Plaintiff made a motion to amend the return *nunc pro tunc* to speak the facts, which was granted. Defendant opposed the motion by a brief, appealing to the discretion of the court and making an argument on the merits, as well as by affidavits as to the facts. Plaintiff contended this was a general appearance and cured any defects in the service.

We pass now to a more detailed consideration of some of the matters of fact.

On May 9, 1921, a subpoena issued commanding Jasper Thomason and Meryle T. Davis to answer the

amended supplemental bill of complaint. [Tr. 215, 216.]

On May 13, 1921, W. S. Walton, deputy United States marshal, made return of said subpoena as follows:

"United States Marshal's Office,)
Southern District of California.) ss:

"I hereby certify, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13 day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason for Jasper Thomason said defendant named therein, personally, at the county of Los Angeles in said district, a copy thereof.

Los Angeles, May 13th, 1921.

C. T. WALTON,
U. S. Marshal.
By W. S. WALTON,
Deputy."

[Tr. 218.]

On October 4, 1923, said W. S. Walton made an amended return of said subpoena as follows:

"Amended Return.) United States Marshal's
Frances Invest. Co.) Office,
vs. D 61) Southern District of Cali-
Friend J. Austin, et al.) fornia.

"I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason said de-

fendant named therein, at the.....county of Los Angeles in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. WALTON,
~~A.~~ ~~C.~~ ~~Sittel,~~ *U. S. Marshal.*
By W. S. WALTON, *Deputy.*"

[Tr. fly-leaf 217.]

On October 5, 1923, W. S. Walton made an affidavit in support of his return of October 4, 1923, as follows:

"State of California,)
County of Los Angeles. (ss.

"W. S. Walton, being first duly sworn, deposes and says: I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering and leaving with Miss Thomason, an adult person who was then a member or resident in the family of Jasper Thomason, said defendant named therein, at the county of Los Angeles, state of California, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of said defendants herein. At said times above mentioned I was a duly qualified and acting Deputy United States Marshall for the Southern District of California.

W. S. WALTON.

Subscribed and sworn to before me this 5th day of October, 1923.

(Seal) CHAS. N. WILLIAMS,
Clerk U. S. District Court, Southern District of California.
By R. S. ZIMMERMAN, *Deputy.*"

[Tr. 217.]

On October 12, 1923, an order *pro confesso* was taken against Jasper Thomason. [Tr. 221.]

Thereafter, and after proper application and order, which will be stated at length presently, the return was amended on May 22, 1925, *nunc pro tunc,* as follows:

"Amended Return.) United States Marshal's
Frances Invest Co.) Office,
vs. D-61) Southern District of Cali-
Friend J. Austin, et al.) fornia.

"I hereby certify and return that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Jane Doe, whose true name is to the undersigned unknown and who is and on said 13th day of May, 1921, was an adult person and a member of the family and resident in the family of Jasper Thomason said defendant named therein, at the county of Los Angeles, in said district, an attested copy thereof, at the dwelling house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. WALTON,
~~A. C. Sittel,~~ *U. S. Marshal.*
By W. S. WALTON, *Deputy.*"

[Tr. 216, 217.]

On April 15, 1925, Jasper Thomason filed his "notice of special appearance and of motion to quash service of subpoena, etc.", which sought to quash the service of subpoena upon Jasper Thomason, and to set aside the order *pro confesso* and final decree on the ground that the only attempted service was on his daughter, Rosamond Mildred Hunt, formerly Thomason, who was at the time under eighteen. [Tr. 148-

151.] There was no request to allow Thomason to defend, no statement that he had a meritorious defense, no showing of diligence, and no waiver of limitations.

In support of the motion were attached three affidavits and points and authorities. [Tr. 152-163.]

Jasper Thomason's affidavit set forth that the court had appointed no one to serve him other than the marshal or his deputy; that "the said marshall did not, nor did any of his deputies, on the 13th day of May, 1921, or at any other time, deliver to affiant a copy of any subpoena issued in the above entitled action, and particularly was no copy of the alias subpoena issued herein on the amended supplemental bill of complaint under date of May 9, 1921, ever delivered to affiant by the said marshal or any of his said deputies, and affiant was not present at the time of delivery of copy of any subpoena to his daughter, Rosamond Mildred Thomason;" that on May 13, 1921, the affiant has only four daughters, all of whom were then married except Rosamond Mildred Thomason, who has since married and whose name is now Rosamond Mildred Hunt. That on May 13, 1921, Rosamond Mildred Thomason was the only member or resident of the affiant's family who could properly be known by the name of Miss Thomason. Affiant then shows by birth certificate that on May 13, 1921, Rosamond Mildred Thomason was only seventeen years, four months old. [Tr. 152-156.]

Rosamond Mildred Hunt's affidavit stated that on May 13, 1921, she was Jasper Thomason's only unmarried daughter, and the only member or resident in

her father's family who was or could be known as Miss Thomason. "That on the said 13th day of May, 1921, one W. S. Walton, who, as affiant is informed and believes, was at that time deputy United States marshal for the Southern District of California, delivered to her a copy of the alias subpoena upon amended supplemental bill of complaint in the above entitled action, and that the said copy of subpoena was not, nor was any copy thereof so far as affiant knows, delivered by the said Walton to her father, Jasper Thomason. That the said Jasper Thomason was not present at the time of the delivery of the said copy of subpoena to affiant, and no other copy of subpoena in the said action was on said day or at any other time ever delivered to affiant." [Tr. 156-158.]

Nellie M. Thomason, Jasper Thomason's wife, in her affidavit stated the family facts set forth in the other two affidavits. [Tr. 159-161.]

On April 27, 1925, plaintiff filed a notice of motion for a continuance of the hearing on Jasper Thomason's motion to quash on the ground that Mr. Lewinson was the only counsel familiar with the facts; that he had not had time to prepare, and would be engaged in a jury case on the date for which the motion was noticed; and on the further ground that there should be an oral hearing with opportunity for cross-examination. [Tr. 237-240.]

In support of the motion was filed an affidavit of Joseph L. Lewinson. [Tr. 240-245.] It set forth that affiant was the only counsel for plaintiff familiar with

the facts of this litigation which had extended over a period of seven years; that affiant by reason of various circumstances set forth in detail had not had an opportunity to prepare affidavits and authorities to resist the motion. The affidavit quotes the return of May 13, 1921, by W. S. Walton, and its amendment on October 4, 1923, and states that about the time the return was amended Meryle Thomason Davis, Jasper Thomason's daughter, testified that Jasper Thomason had an adult daughter residing in his household on May 13, 1921, and prior and subsequent thereto. The affidavit then goes on:

"Your affiant charges that it is clear to a moral certainty that said Jasper Thomason personally received said *subpoena ad respondendum* from his daughter and in that connection states: It is charged in said amended supplemental bill of complaint that one H. F. Davis and one Meryle Thomason Davis participated with said Jasper Thomason in the frauds found by the court to have been committed by said Thomason; that said H. F. Davis was up to and including the trial of said cause, a son-in-law of said Jasper Thomason, and said Meryle Thomas Davis is a daughter of said Jasper Thomason; that said Davis was a defendant in said cause and an attorney for numerous other defendants therein. Said Meryle Thomason Davis was a witness in said cause and said Jasper Thomason was subpoenaed as a witness and evaded service of such subpoena; that in order to serve such subpoena, plaintiff not only placed the same in the hands of the United States marshal, but also procured an order for the service of the same by private persons and employed the Pinkerton National Detective Agency to serve the same. Said

agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process; that at the time of the trial of said cause, said H. F. Davis did not appear, although charged with frauds of the gravest character, and at said trial, said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico, and that said Jasper Thomason was at a place unknown and beyond the reach of communication in the mountains of Kern county." [Tr. 243.]

The affidavit continued that because of the complicated facts of the case it would take at least two days to cross-examine Jasper Thomason, that "affiant verily believes said Thomason would not submit to said cross-examination for fear of contempt of court and prosecution for perjury." The affidavit prays a continuance and a hearing on oral testimony.

On the same day, April 27, 1925, Mr. Ashburn, one of the solicitors for Jasper Thomason, made and filed an affidavit detailing various telephone conversations with Mr. Lewinson and the state of Mr. Ashburn's calendar in opposition to the continuance. [Tr. 163-165.]

On the same day, April 27, 1925, Jasper Thomason also filed affidavits of Meryle Thomason Davis, W. S. Mortenson, and Rosamond Mildred Hunt. [Tr. 253-260.]

Meryle Thomason Davis in her affidavit denied that she testified that Jasper Thomason had an adult daugh-

ter residing in his household on May 13, 1921, and denied that such was the fact. She denied Thomason evaded service and sets forth that he could have been found at his various residences in Pasadena, Santa Monica, and Brentwood Park, California, from January 23, 1920, to August 26, 1923. The street addresses and the dates he occupied each residence are given. She stated that on August 26, 1923, Jasper Thomason went to Nevada with the affiant on business for six weeks, and that aside from short trips to his wife's ranch near Wineville, California, he has been at his residence in Brentwood Park ever since. She further stated that Jasper Thomason was suffering from a nervous breakdown. [Tr. 253-255.] Attached is an unsworn letter from a Dr. Brainerd to Judge James saying it would be detrimental to Thomason's health to appear in court. [Tr. 256.]

Dr. Mortensen's affidavit states that it would endanger Thomason's life to make him appear in court. [Tr. 256, 257.]

The material part of Rosamond Mildred Hunt's affidavit is as follows:

"* * * that the *subpoena ad respondendum* referred to in the affidavit of Joseph L. Lewinson on motion for continuance, which affidavit is dated April 25, 1925, was never delivered to Jasper Thomason by her, and she verily believes that said subpoena was never delivered to said Jasper Thomason at any time.

"That at the time said subpoena was left at the dwelling house of said Jasper Thomason, a copy thereof was offered to this affiant. She refused to receive

it and did not take it into her possession or handle it at all. That the marshal, or the person who left the said subpoena, after offering it to affiant, threw it on the floor in her presence and it remained there for some time. At the time he offered the said subpoena to affiant she was on the inside of the house and there was a screen door between herself and said marshall. *She told the marshall at that time that she was not of age,* and that she had no right or disposition to receive any papers for her father, that if he wanted to serve any papers upon her father or transact any business in which he was interested that he should see her father, and that he would probably be at home soon.

"Affiant further says that the said subpoena left as aforesaid disappeared before the return of her said father, Jasper Thomason, and she verily believes that the said subpoena never came into the possession of her said father at any time." [Tr. 258-259.] (Italics ours.)

We wish to point out to the court that Rosamond accuses the marshal not of making a mistake as to her age, but of making with knowledge a deliberately false return.

On April 27, 1925, Judge James, to whom the case had been reassigned, denied the continuance, and gave plaintiff two days to file authorities. [Tr. 246.]

On April 29, 1925, plaintiff filed an affidavit of Mr. Lewinson in opposition to the motion to quash [Tr. 247-252], which contains everything contained in his affidavit on the motion for a continuance and in addition the following:

"* * * and at said trial, said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico and that said Jasper Thomason was somewhere in Kern county, California, at a location which no one knew, but that she, Meryle Thomason Davis, had talked to him during the previous week.

"That if upon a consideration of plaintiff's 'Memorandum of Points and Authorities', filed herewith, this Honorable Court shall nevertheless be of the opinion that the return of the marshal herein may be contradicted and that the other points made by the plaintiff in said memorandum are not sufficient to warrant a denial of said motion, affiant prays that this motion be set down for hearing upon oral testimony; that the facts in said case are complicated and involve numerous transactions; that by reason of defendant Jasper Thomason's intimate personal relationship with other defendants, and by reason of the other matters and things herein averred, affiant verily believes that if said defendant Jasper Thomason and said defendant's daughter, Rosamond Thomason Hunt, are required to appear before this Honorable Court and by oral testimony support their contentions upon this motion, it will appear beyond question that this motion is not made in good faith but solely for purposes of delay, and that said defendant Jasper Thomason has been guilty of laches in prosecuting this motion, and that he had at all times knowledge of the pendency of this action and of proceedings therein taken against himself, and that he did in fact on or about May 13, 1921, receive from some member of his household the copy of the subpoena left by the marshal." [Tr. 250-251.]

Jasper Thomason filed an additional affidavit of Meryle Thomason Davis quoting her testimony at the trial on the question of whether her father had an adult daughter residing in his household in May, 1921. Under examination by Mr. Lewinson in the morning she testified that her father had an adult daughter residing in his household in May, 1921. Under examination of her own counsel in the afternoon she said that her youngest sister at the time of attempted service on her was only seventeen. [Tr. 260-267.] The foregoing affidavit was not filed till August 5, 1925, according to the record [Tr. 267], which was after the order deciding the matter. The affidavit was receipted for, however, on April 30, 1925, and was undoubtedly delivered to Judge James personally.

While Jasper Thomason's motion to quash was pending, on May 7, 1925, plaintiff filed an *ex parte* "application to amend marshal's return *nunc pro tunc*." [Tr. 268-270.]

On the same day plaintiff filed an affidavit of W. S. Walton which is of such vital importance on this appeal that it is quoted in full:

"My name is W. S. Walton. From December, 1914, to March, 1922, I was a duly appointed, qualified and acting United States deputy marshal for the Southern District of California, except during a portion of the years 1918 and 1919. During the period mentioned C. T. Walton was the duly appointed, qualified and acting United States marshal for said district.

"In May, 1921, a *subpoena ad respondendum* directed to Jasper Thomason and Meryle T. Davis was

placed in my hands as deputy United States marshal, as aforesaid, for service upon said defendants; that prior to being placed in my hands said subpoena had been in the hands of three deputy United States marshals for service, and the same had not been served; that on May 9, 1921, I proceeded to the residence of said Jasper Thomason in the city of Santa Monica, county of Los Angeles, state of California. I spent about one hour in watching said residence, being seated in an automobile in close proximity to the same. While I was so watching said house, I saw an elderly man go from the yard into the house and return three times. At the time I believed said man was the defendant, Jasper Thomason, and I still believe so. After so watching said place of residence, I rang the front door bell and a woman answered the same. I had substantially the following conversation with said woman:

"She came to the door, and I asked her if this was the home of Jasper Thomason, and she said that it was. I asked her if he was home, and she said 'No, he is not here. I think he is down in Imperial Valley.' I said, 'Are you his wife?' She said, 'No. I am his daughter.' I said, 'I have some papers to serve on Mr. Thomason, and I think I can serve them on you. You are of age, aren't you?' And she said, 'I am twenty-six years old.' I said, 'What is your name?' and she said, 'I am a married daughter of Mr. Thomason.' I said, 'All right. I have a right to serve this on any adult member living in the same house. This is Mr. Thomason's home, isn't it?' She said, 'Yes.' She took the papers in her hand, and she said, 'Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not.' I said, 'You can suit yourself. I have a right to serve them on any adult member in this

house.' She dropped them, and I went out and got in my machine.

"After making said service, as aforesaid, I made return on May 13, 1921, as follows:

" 'United States Marshal's Office,)
Southern District of California.) ss.

I hereby certify, that I have received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason and by delivery to and leaving with Miss Thomason for Jasper Thomason said defendants named therein, personally, at the county of Los Angeles in said district, a copy thereof.

C. T. WALTON,
U. S. Marshal.
By W. S. WALTON,
Deputy.

Los Angeles, May 13, 1921.'

"Several days prior to October 4, 1923, I was in the office of Al Sittle, then duly appointed, qualified and acting United States marshal for the Southern District of California, and Mr. Sittle called my attention to the return in said case, saying that he had been requested by the attorneys for the plaintiff to amend the same, and asked me to meet said attorneys. Said cause was then on trial, and Mr. Sittle took me into the court room and introduced me to Mr. Joseph L. Lewinson, one of the attorneys for the plaintiff. Mr. Lewinson asked me if the subpoena had been served upon an adult person who was a member or resident in the home of said Jasper Thomason, and I stated to him that it had been. He thereupon requested Mr. Sittle, in my presence, to amend the return accordingly. Mr. Sittle replied that he was willing to amend the return,

but that as the process had been served prior to his term of office, it would have to be amended in the name of his predecessor. Later, and on October 4, 1923, I returned to the office of the United States marshal, and prepared an amended return in words and figures following:

" 'Amended Return.

Frances Investment Co.
vs.
Friend J. Austin, et al.

United States Marshal's Office,
Southern District of California.

I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the county of Los Angeles, in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of the said defendants herein.

C. T. WALTON,
U. S. Marshal.
By W. S. WALTON,
Deputy.

Los Angeles, California, October 4, 1923.'

"Said amended return was signed by me and handed to Mr. Sittle, who filed the same with the clerk of said court.

"I know of my own knowledge that the facts stated in said return and said amended return are true, except that by inadvertence I stated the name of the person upon whom the service was made, to be Miss Thomason, when as a matter of fact service was made

on one of the married daughters of said Jasper Thomason. At the time the service was made there was a small boy in the room, who, the woman with whom the copy was left, stated was her child. She also stated, referring to the abode, 'This is my home.'

"I could without difficulty identify the person upon whom the service was made." [Tr. 274-279.] (Italics ours.)

In opposition to the application to amend the return Jasper Thomason filed a brief entitled "Memorandum in Opposition to Application to Amend Marshal's Return." [Tr. 279-297.] The argument contained in the brief is in accordance with its title. The brief begins as follows: "The application which is now made on behalf of plaintiff for amendment *nunc pro tunc* of the marshal's return of service upon the defendant Jasper Thomason contemplated the filing of a document which essentially falsifies the amended return upon which the order *pro confesso* was entered and the final decree rendered." [Tr. 279-280.] The concluding paragraph of the brief begins as follows: "For all of the foregoing reasons we respectfully submit to the court that the application for leave to amend the return should be denied." [Tr. 296.] An examination of the entire argument made in the brief of defendant in opposition to the motion to amend will disclose that it admits the power of the court to grant the motion and appeals to the discretion of the court to deny it. The brief made the further argument on the merits that the amendment would prove nugatory since the decree exceeded the prayer of the bill. [Tr. 295-296.]

In addition to the brief, Jasper Thomason filed six affidavits, which were referred to in the "Memorandum." [Tr. 297-314.] The transcript [page 314] shows that these affidavits were not filed till August 5, 1925, which was after the matter was decided, but they were receipted for May 13, 1925. [Tr. 313.] Probably they were delivered to Judge James instead of to the clerk, and the filing stamp was put on when they reached the clerk.

The first affidavit is that of Rosamond Mildred Hunt. Since it contradicts the affidavit of Walton, which we have heretofore quoted in full, we also set it forth in full:

"That she is the same person who submitted affidavits herein verified respectively April 7, 1925, and April 26, 1925; and supplementing the said affidavits and replying to the affidavit of W. S. Walton filed herein on or about May 7, 1925, affiant says that her father Jasper Thomason was not in or about his residence on the 13th day of May, 1921, and was at said time in the Antelope Valley, county of Los Angeles, California; that at the said time there was no person who resided in or constituted a part of the family of the said Jasper Thomason except affiant's mother and affiant.

"That on the said last mentioned date affiant's sister, Meryle Thomason Davis, together with her son, Henry Fairfax Davis, Junior, were visiting at her father's home. That prior to the arrival of the deputy United States marshal on said day the said Meryle Thomason Davis had left her father's home and had left her child with affiant; that upon the arrival of the said deputy

marshal, whom affiant believes to be the said W. S. Walton, he stated to affiant that he had a subpoena which he desired to serve upon her father Jasper Thomason and affiant stated to him that the said Jasper Thomason was not at home but was out of town; that the said deputy marshal then asked for Meryle Thomason Davis, and affiant told him that she was out of town also; that the said deputy marshal thereupon told affiant to take the said papers and hand them to her father upon his return, and affiant then said that if said marshal had any papers to serve upon her father he could bring them back again and deliver them to him when he was at home, and the said deputy then stated that he desired to leave the said paper with affiant, and that he could not be running down there all the time. Thereupon affiant said substantially, 'Can you serve these papers upon me?' And said deputy said that he could serve said papers upon any adult member of Mr. Thomason's family. Then affiant said that she was only seventeen (17) years of age and asked him if he could serve the papers upon a minor, to which the said deputy replied, 'Yes, you are seventeen (17)' and sneered. He then asked affiant her name and she said 'Thomason', whereupon he looked at the child of Meryle Thomason Davis who was then and there present and again smiled and asked 'Miss or Mrs.', to which affiant replied 'Miss Thomason.' Said deputy also asked affiant her first name and affiant's best recollection is that she told him her first name and told him correctly that it was Rosamond; meantime affiant had latched the screen door which stood between her and the said officer, who told her that she had better take the papers because if they blew away she would be in trouble. Affiant told him that she would not take the papers and if he did not want them to blow away he could put them in the mail box, but this he declined

to do, saying, 'I can't serve a mail box', and then threw the said paper upon the floor of the porch and left the premises.

"That affiant's aunt, Emma Harris, at that time lived across the street from affiant's father's residence and affiant immediately after said deputy had left went to her aunt's house and told her the whole of the said incident. That when affiant's sister, Meryle Thomason Davis, returned to her father's residence the said aunt was present and affiant, in the presence of said aunt, repeated the said incident to the said Meryle Thomason Davis.

"Affiant further says that there was not on the said May 13th, 1921, so far as affiant knows, any elderly man in the said residence of her father nor did any such elderly man go from the yard into the house and return three or any number of times.

"Affiant, referring particularly to the said affidavit of Walton filed herein, says that she did not tell him that she thought her father was down in Imperial Valley; that the said Walton did not upon the occasion mentioned in his said affidavit say to affiant, 'You are of age, aren't you?' And affiant did not say to him, 'I am twenty-six years old,' but on the contrary did tell him that she was only seventeen (17) years of age. That affiant did not say to the said Walton, 'I am a married daughter of Mr. Thomason.'

"That it is not true that affiant did take the said papers or any papers in her hand, nor did she say in substance or effect, 'Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not,' nor did she make any portion of said alleged statement.

"Affiant further says that it is not true that the said deputy then said to her, 'You can suit yourself. I have

a right to serve them on any adult member in this house.' Affiant further says that she did not state to the said Walton at said time or place, or at all, that the said small child who was in the room with her was her child, nor did the said Walton, so far as affiant remembers, ask or receive any information as to who was the mother of the said child.

"Affiant further says that she had but one conversation or interview with the said W. S. Walton and that there was but one occasion upon which a United States marshal/ or his deputy attempted to make service upon the defendant Jasper Thomason by leaving or attempting to leave a paper with affiant, and that according to affiant's best knowledge and belief the said occasion was May 13th, 1921, and not May 9th, 1921.

"Affiant further says that she was not married on or prior to said May 13th, 1921, nor at any time prior to July 19, 1923, and that her age at the time of the said attempted service was exactly as set forth in her affidavit made herein on the 7th day of April, 1925." [Tr. 297-301.]

Again Rosamond accuses the marshal of making a wilfully false return.

Meryle Thomason Davis said in her affidavit that she was not living at her father's house on May 13, 1925, but that she was visiting there; that she was out when Walton came and had left her two-year-old son with her sister, Rosamond Mildred, who told her and their aunt, Emma Harris, about the attempt to serve the subpoena, when she returned home, substantially as is set forth in Rosamond Mildred's affidavit. [Tr. 302-304.]

Emma Harris deposed that she is and was Rosamond Mildred's aunt; that on May 13, 1921, she lived almost directly across the street from Jasper Thomason. That she knows that on May 13, 1921, no one was residing with Jasper Thomason except Mrs. Jasper Thomason and Rosamond Mildred. That on May 13, 1921, affiant saw a man talking to Rosamond Mildred Thomason at the front door of Jasper Thomason's house and at the same time saw with Rosamond Mildred the small son of Meryle Thomason Davis. That affiant knows that Rosamond was the only daughter home at the time, and the screen door was not opened. That when the man left, Rosamond came over and told her the whole story, as is set forth in Rosamond's affidavit. That later Rosamond told affiant and Meryle Thomason Davis the whole story. [Tr. 305-307.] The affiant does not say that she saw the man approach, or saw the whole interview.

Nellie M. Thomason said in her affidavit that she is and was Jasper Thomason's wife. That on May 13, 1921, all the daughters were married and none lived with them except Rosamond Mildred, although Meryle was visiting them at the time; that on said date she and her husband were visting another married daughter, Mrs. Schupp, in Antelope Valley. That Rosamond was not then married. That affiant never talked to Walton. "That affiant never saw the said subpoena so attempted to be served, nor did she ever know of its delivery by any person to the defendant, Jasper Thomason, but affiant verily believes that the said subpoena was not delivered to him, nor did it ever come into his

possession." That Jasper Thomason was sick in a sanitarium and could not make an affidavit. [Tr. 307-309.]

Mrs. Schupp, another daughter, deposed that her mother and father were visting her in Antelope Valley on May 13, 1921, and that she never talked to Walton. [Tr. 309-311.]

Verna Thomason Stark in her affidavit said she was a married daughter of Jasper Thomason and that on May 13, 1921, she lived in San Pedro, California, and believes she was home, and knows she never talked to Walton. [Tr. 311-313.]

In a brief filed May 16, 1925, plaintiff again asked to cross-examine Thomason's witnesses, and to have the marshal go on the stand and identify the person with whom he left the subpoena. [Tr. 315-316.]

On May 22, 1925, Judge James made an order allowing the return to be amended and filed *nunc pro tunc.* [Tr. 318-319.] The return as so amended is set forth on page 10 of this brief. [Tr. 216-217.]

On May 25, 1925, Judge James made an order quashing the service and vacating the decree entered against Jasper Thomason. [Tr. 320-322.]

On July 3, 1925, plaintiff moved to set aside the order of May 25, 1925. [Tr. 323-329.] Jasper Thomason's solicitors opposed the motion as *amici curiae.* [Tr. 330.] Judge James denied the motion. [Tr. 333.]

Through an error of the printer, pages 148 to 213 of the transcript are not in chronological order. The

proceedings beginning with the "Notice of Special Appearance and of Motion to Quash Service of Subpoena, etc.", on page 148 and ending with the words "Solicitors for defendant Jasper Thomason appearing specially", in the sixth and seventh lines from the bottom of page 213, should be inserted after page 234.

The affidavit of A. W. Ashburn filed April 27, 1925 [Tr. 163-166], should have been inserted immediately after the affidavit of Joseph L. Lewinson, filed April 27, 1925 [Tr. 240-245], and the affidavits of Meryle Thomason Davis, W. S. Mortensen, and Rosamond Mildred Hunt, filed together April 27, 1925 [Tr. 253-260], should follow said affidavit of A. W. Ashburn.

On checking the transcript counsel for appellant called the errors to the attention of Parker, Stone & Baird, the printers. It seems the errors occurred during the vacation of the person who usually had charge of the work. Mr. Baird offered to print the entire transcript over. Mr. Ashburn, counsel for appellee, was consulted, and he very generously said that was unnecessary. We ask the indulgence of the court if any inconvenience is caused thereby. We have endeavored to obviate the inconvenience by our statement of facts.

Errors Relied On.

1. The marshal's amended return showed good and valid service on Jasper Thomason, and such return was conclusive, especially on a motion to vacate as distinguished from a motion to be let in and defend, and in view of defendant's laches. [Assignment of Errors 1, 2, 7, 8, and 9; Tr. 340, 341.]

2. Even if the marshal's return was not conclusive, the court should have found the facts in accordance with the amended return. [Assignment of Errors 12 and 17; Tr. 341.]

3. The service should not have been quashed without an oral hearing and an opportunity for cross-examination. [Assignment of Errors 10 and 11; Tr. 341.]

4. There was a compliance with Equity Rule 13, even if the subpoena was left with Rosamond Mildred Hunt, formerly Thomason. [Assignment of Errors 4, 5 and 6; Tr. 340.]

5. Jasper Thomason made a general appearance and made the judgment against him good and valid. [Assignment of Errors 13, 14, 15, and 16; Tr. 341-342.]

6. The court erred in setting aside the service and vacating the decree, and in refusing to vacate its order so doing for the foregoing reasons. [Assignment of Errors 1-17; Tr. 339-342.]

BRIEF OF THE ARGUMENT.

I.

The record shows that Jasper Thomason on May 13, 1921, at the time of the service upon him, was within the territorial jurisdiction of the Court. The amended return of the Marshal was complete and self-supporting on its face. These facts being so, the return of the Marshal was conclusive.

A. *Where a return of an officer of the court is complete and self-supporting on its face, and where the defendant at the time of service is within the territorial jurisdiction of the court, as between the parties the return is conclusive.*

At the time of service the defendant was within the territorial jurisdiction of the court. [Tr. 254.]

The return as amended *nunc pro tunc* is complete and self-supporting on its face. [Tr. 216-217.]

The return may be amended though the officer's term has expired, and its effect is retrospective.

Morrissey v. Gray, 160 Cal. 390, 396;
Jones v. Gunn, 149 Cal. 687, 692;
Morris v. Trustees, 15 Ill. 266, 270;
Herman v. Santee, 103 Cal. 519;
18 Ency. of Pleading & Practice, 963.

In a case where territorial jurisdiction is admitted, and the return is complete and self-supporting on its face, the return should be held conclusive as between the parties.

Joseph v. New Albany Steam Mill Co., 53 Fed. 180 (C. C. Ind.);

Von Roy v. Blackman, Fed. Cas. No. 16,997 (C. C. La.);

Trimble v. Erie Electric Motor Co., 89 Fed. 51 (C. C. Pa.);

Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843 (D. C. E. D. Pa.);

19 Vin. Abr. 195;

Hallowell v. Page, 24 Mo. 590;

The State to Use v. O'Neill, 4 Mo. App. 221;

Angell v. Bowler, 3 R. I. 77;

St. Louis etc. Co. ex parte Petition, 40 Ark. 141;

Smoot v. Judd, 184 Mo. 508, 83 S. W. 481 (and the multitude of cases cited);

Gwynne on Sheriffs, p. 473;

Frank P. Miller Paper Co. v. Keystone Coal Co., 110 Atl. 79 (Sup. Ct. Pa.);

Preston v. Kindrick, 94 Va. 760;

Sutherland v. People's Bank, 69 S. E. 341 (Sup. Ct. Va.);

Tillman v. Davis, 28 Ga. 494.

B. *If the court refuses to adopt the rule of conclusiveness of the marshal's return as urged by appellant under point I. A., it should at least adopt the rule in a modified form. Where territorial jurisdiction is admitted, and the marshal's return is complete and self-supporting on its face, the court should not vacate the decree founded on that return, unless the defendant shows absence of laches and a meritorious defense, and offers to waive the statute of limitations and come in and defend.*

The defendant did not ask to open the decree and make a defense in this case; he asked the court instead to vacate the decree. [Tr. 149-150.]

Nor did the defendant show a meritorious defense. [Tr. 149-150.]

The record shows the defendant had full knowledge of the pendency of the suit. [Tr. 221; 151; 153; 158; 259; 308; 102, 228; 66, 67, 128; 299; 254, 255; 250, 251.]

Nor was there any offer to waive the statute of limitations. [Tr. 149-150.]

In such a case the court should hold the return of the marshal conclusive. The only argument that has ever been advanced against the rule of conclusiveness of the sheriff or marshal's return is the injustice of denying to the defendant his day in court. When the defendant is not asking for his day in court, as in this case, but is petitioning the court to place the statute of limitations between him and plaintiff's just cause of

action, and where, as here, the defendant makes no showing of a meritorious defense, and no showing of due diligence, the court should not go off the face of the record to do injustice. Certainly in such a case the rule of conclusiveness should be applied.

St. Louis etc. Co. ex parte, 40 Ark. 141;
Wells Fargo & Co. v. Baker Lumber Co., 107 Ark 415, 155 S. W. 122;
Nichols v. Nichols, 96 Ind. 433;
Neitert v. Trentman, 104 Ind. 390, 4 N. E. 360;
Groff v. Warner, 89 N. E. 609 (Ind. App.);
Shepherd v. Marvel, 45 N. E. 526 (Ind. App.);
Cully v. Shirk, 30 N. E. 882 (Ind. Sup.);
Angell v. Bowler, 3 R. I. 77;
Locke v. Locke, 30 Atl. 422 (R. I. Sup.);
Cooke v. Haungs, 113 Ill. App. 501;
Massachusetts Benefit Life Assn. v. Lohmiller, 74 Fed. 23 (C. C. A., 7th Cir.);
Cowden v. Wild Goose Mining & Trading Co., 199 Fed. 561, 565 (C. C. A., 9th Cir.);
Martin v. Gray, 142 U. S. 236;
Gregory v. Ford, 14 Cal. 138;
Hawley v. State Assurance Co., 182 Cal. 111, 113;
State v. Hill, 50 Ark. 458;
Hilton v. Thurston, 1 Abb. Prac. (N. Y.) 318;

II.

Even if the Court refuses to adopt the rule of conclusiveness, the evidence was insufficient to rebut the Marshal's return supported by his affidavit. Certainly it should not have been impeached without an oral hearing, and an opportunity for cross-examination.

In an equity case the appellate court will review the facts as well as the law.

La Abra Silver Mining Co. v. U. S., 175 U. S. 423, 464, 465, 466.

Even in states where the return may be impeached, as in Georgia, by statute, it is held that the "strongest" testimony is necessary to overthrow it.

Davant v. Carlton, 53 Ga. 491.

The evidence offered in this case was insufficient to rebut the marshal's return supported by his affidavit. The marshal was disinterested. The only evidence to contradict him came from Thomason's family. Thomason and his family resisted plaintiff's attempt to cross-examine them. The marshal was willing to be cross-examined. The contradiction of the marshal's testimony rests really on the affidavits of Thomason's two daughters. The first daughter, Meryle Thomason Davis, was convicted by the court of the gravest frauds. The second daughter, Rosamond Mildred, cannot be believed. She stated she told the marshal she was under eighteen. This is incredible, and destroys the value of her testimony. The marshal would

not make a deliberately false return; he had no interest in so doing. It appeared that Thomason was evading service; under such circumstances, the marshal would not serve a daughter who told him she was only seventeen. [Tr. 274-279; 158; 258-259; 278; 157, 158; 258; 259; 297-301; 298; 253, 260, 302; 275; 250; 260-267.]

Certainly the return should not have been overthrown without oral examination and cross-examination.

III.

Even if we admit that the subpoena was delivered to Rosamond Mildred Hunt (formerly Thomason), as contended by appellee, and not to Meryle Thomason Davis, as contended by appellant, there was still a compliance with Equity Rule 13. The words "adult person" in Equity Rule 13 mean a "matured person" not a person of legal age.

According to the defendant's own showing, Rosamond Mildred Hunt, a member and resident in the family of defendant Jasper Thomason, received a copy of the subpoena at Jasper Thomason's dwelling house and usual place of abode. There is no showing that Rosamond Mildred Hunt was not matured and of full size and strength. It appears from appellee's own showing that she was seventeen years and four months old. [Tr. 158; 276; 151; 236.]

These facts show a full compliance with Equity Rule 13.

Equity Rule 13.
Webster's New International Dictionary.
21 R. C. L. 1281.
Phoenix Insurance Co. v. Wulf, 1 Fed. 775 (C. C. Dist. of Ind.);
In re Risteen, 122 Fed. 732 (Dist. Ct. Mass.).

IV.

By filing affidavits and a brief in opposition to plaintiff's motion to amend the Marshal's return nunc pro tunc, and by making an argument on the merits in the brief, defendant Jasper Thomason made a general appearance. Thereby he cured any defects in the jurisdiction of the court over his person and made the decree a good and enforceable decree for all purposes.

A. *By filing affidavits and a brief in opposition to plaintiff's motion to amend the marshal's return nunc pro tunc, and by making an argument on the merits, defendant Jasper Thomason made a general appearance.*

The defendant Thomason filed a brief and affidavits in opposition to plaintiff's motion to amend, appealed to the discretion of the court, and argued the merits, all while his motion to quash was still pending. [Tr. 268-279; 279-297; 296; 295-296; 297-314.]

Such action constituted a general appearance.

Bestor v. Inter-County Fair, 135 Wis. 339, 115 N. W. 809;

Stubbs v. McGillis, 44 Colo. 138, 96 Pac. 1005, 18 L. R. A., N. S., 405;

Crawford v. Foster, 84 Fed. 989 (C. C. A. 7th Cir.);

Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935;

Lowry v. Tile Mantel & Grate Assn. of Cal., 98 Fed. 817 (Cir. Ct. N. Dist. Cal.);

Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. App. D. C.);

Twin Lakes Land and Water Co. v. Dohner, 242 Fed. 399, 403, 404 (C. C. A., 6th Cir.);

Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A., 7th Cir.);

Lively v. Pictou, 218 Fed. 401 (C. C. A. 6th Cir.);

Ricketts v. Bolton, 173 Ky. 739, 743, 191 S. W. 471, 473;

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;

Sterling Tire Corporation v. Sullivan, 279 Fed. 336 (C. C. A., 9th Cir.);

4 C. J., 1334;

Wabash Western Railway v. Brow, 164 U. S. 271, 278;

Edgell v Felder, 84 Fed. 69, 70 (C. C. A., 5th Cir.);

Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429 (C. C. A., 5th Cir.);

Everett Railway Light and Power Co. v. U. S., 236 Fed. 806 (Dist. Ct. Wash.);

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 (C. C. Nev.);

Briggs v. Stroud, 58 Fed. 717 (C. C. E. Dist. Wis.);

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659 (Dist. Ct. Ore.);

Placek v. American Life Insurance Co., 288 Fed. 987 (Dist. Ct. Wash.);

Zobel v. Zobel, 151 Cal. 98.

B. *Where, as in this case, defendant makes a special appearance to object to the jurisdiction, as for instance a motion to quash service, and pending decision on the motion, he does something which amounts to a general appearance, his objections to the jurisdiction are waived, and his motion will be denied.*

Yale v. Edgerton, 11 Minn. 271, Gil. 184;

New Albany & S. R. Co. v. Combs, 13 Ind. 490;

Barnes v. Western U. Teleg. Co., 120 Fed. 550;

Grizzard v. Brown, 2 Tex. Civ. App. 584, 22 S. W. 252;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144 (C. C. A., 8th Cir.).

C. *The fact that the general appearance is made after the decree instead of before is immaterial. It cures any defects in the jurisdiction of the court over the person of the defendant and the decree is a good and enforceable decree for all purposes.*

Ann. Cas., 1914 C, 694, note;
4 C. J., 1364, 1365;
Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;
Sugg v. Thornton, 132 U. S. 524, 530;
Security Loan and Trust Co. v. Boston etc. Co., 126 Cal. 418;
Willett v. Blake, 134 Pac. 1109 (Sup. Ct. Okla.);
Johnson Loan and Trust Co. v. Burr, 51 Pac. 916 (Ct. App. of Kan.);
Boulder Colorado Sanitarium v. Vanston, 94 Pac. 945 (Sup. Ct. of N. M.);
Crowell v. Kopp, 189 Pac. 652 (N. M. Sup.);
Jackson v. Lebanon Reservoir and Ditch Co., 171 Pac. 997 (Ariz. Sup.);
German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;
Barba v. People, 18 Colo. App. 16;
Ryan v. Driscoll, 83 Ill. 415;
McCarthy v. McCarthy, 66 Ind. 128;
Balfe v. Rumsey etc. Co., 55 Colo. 97, 133 Pac. 417;
Pry v. Hannibal and St. Joseph R. R. Co., 73 Mo. 123;
Tisdale v. Rider, 104 N. Y. S. 77;

Borough of Jeannette v. Roehme, 47 Atl. 283 (Sup. Ct. of Pa.);

Nelson v. Nebraska Loan and Trust Co., 87 N. W. 320 (Sup. Ct. of Neb.);

Nebraska Loan and Trust Co. v. Kroener, 88 N. W. 499 (Sup. Ct. of Neb.);

Barnett v. Holyoke Mutual Fire Insurance Co., 97 Pac. 962 (Sup. Ct. of Kan.);

Clarkson v. Washington, 131 Pac. 935 (Sup. Ct. of Okla.).

ARGUMENT.

I.

The record shows that Jasper Thomason on May 13, 1921, at the time of the service upon him, was within the territorial jurisdiction of the court. The amended return of the Marshal was complete and self-supporting on its face. These facts being so, the return of the Marshal was conclusive.

A. *Where a return of an officer of the court is complete and self-supporting on its face, and where the defendant at the time of service is within the territorial jurisdiction of the court, as between the parties the return is conclusive.*

On May 13, 1921, it is admitted by the defendant's own affidavits that Jasper Thomason was within the territorial jurisdiction of the court. [Tr. 254.] There can likewise be no question that the return as amended

nunc pro tunc is complete and self-supporting on its face. The return is as follows:

"Amended Return.) Southern District of Cali-
Frances Invest. Co.) fornia.
vs. D-61) United States Marshal's
Friend J. Austin, et al.) Office,

I hereby certify and return that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Jane Doe, whose true name is to the undersigned unknown and who is and on said 13th day of May, 1921, was an adult person and a member of the family and resident in the family of Jasper Thomason said defendant named therein, at the county of Los Angeles, in said district, an attested copy thereof, at the dwelling house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. WALTON,
~~A. C. Sittel,~~ *U. S. Marshal.*
By W. S. WALTON, *Deputy.*"

[Tr. 216, 217.]

Equity Rule 13 is as follows:

> "The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."

It will be seen that the return shows a compliance with the rule in all respects.

Of course, it can make no difference that Walton was no longer an officer at the time the return was

amended. Nevertheless, he may amend his return *nunc pro tunc.*

Morrissey v. Gray, 160 Cal. 390, 396 (citing numerous cases);
Jones v. Gunn, 149 Cal. 687, 692;
Morris v. Trustees, etc., 15 Ill. 266.

In *Morris v. Trustees, etc., supra,* the court said at page 270:

> "* * * That decision is conclusive of this case, except in one particular. Here the official term of the sheriff had expired. But that did not prevent him from perfecting the return. He amended the return as sheriff, and he may be held liable in that character if it was false. It was not the doing of a new act, but merely furnishing the legal evidence of an act done while in office. This position is sustained by adjudged cases. In *Adams v. Robinson,* 1 Pick. 461, a sheriff was allowed to sign a return to an attachment after he had ceased to be an officer. In *Gray v. Caldwell,* Hardin 63, a sheriff was permitted to indorse a return on a writ of *ad quod damnum,* several years after he was out of office. See, also, *Childs v. Barrows,* 9 Metc. 413; *Gilman v. Stetson,* 16 Maine 124; *Rucker v. Harrison,* 6 Munf. 181; *Hutchins v. Brown,* 4 Harris & McHenry, 498, and *Brown's Adm'r v. Hill,* 5 Pike 78."

Such amendment will be permitted long after judgment is entered.

Jones v. Gunn, 149 Cal. 687, 692.

Such amendment may be permitted by the court upon the hearing of a motion to vacate the judgment even though no notice of such proposed amendment has previously been given to the moving party.

Herman v. Santee, 103 Cal. 519.

And the amendment has a retroactive effect. Thus it is said in 18 *Ency. of Pleading and Practice,* 963:

> "An amendment of the return relates back to the original return and operates from that time, where the rights of innocent third parties are not affected." (Citing many cases.)

To the same effect, see:

Jones v. Gunn, 149 Cal. 687.

So we have a case where we have a return complete and self-supporting on its face, with territorial jurisdiction admitted and a defendant seeking to show that the return is false, in order to make void and vacate a decree. It is the contention of the appellant that in such case the return is conclusive. If so, of course, Jasper Thomason's motion to vacate should have been denied. We do not believe that the question raised is settled by any authority binding on this court. Before reviewing the authorities we shall discuss the question on principle.

When a defendant is not within the territorial jurisdiction of the court, that is, when he is not within the boundaries of the sovereignty of which the court is an agent, it may be that he should be allowed to contradict an officer's return that shows the

contrary. It is not merely a question of whether he has been given notice by the officer of the court; it is a question whether the sovereign ever acquired power over him. Moreover, he has a right to have the suit tried in the courts of his own sovereign.

It seems clear, also, that when the officer's return is not complete and self-supporting on its face, it cannot be conclusive, since the plaintiff to support it must offer extraneous evidence.

In other cases, the officer's return should be conclusive. We have not a question of jurisdiction in the strict sense, as in the case when the defendant is not within the boundaries of the sovereignty; we have a question of whether the defendant has been given notice of the pendency of the proceedings. Of course, if there is not the proper notice, the court has no jurisdiction over the defendant's person. How is the court to determine that question? In the first instance, of course, it must be determined from the return of its officer. The court should not go further, if the defendant is within the territorial jurisdiction of the court, and if the return is complete and self-supporting on its face.

Litigation has already become so interminable that many honest litigants are kept out of the courts. Questions must be determined finally at some time. If the court is to take its time to examine into the truth of the statements of its sworn officers, whenever questioned, there will be no end. It is not the cases where there is merit in the contention that will trouble

the court; they will be few. It is the cases where the point is but one more means of delaying justice, already too long delayed.

We regard the argument often made for the conclusiveness of the return; namely, the absolute verity of the court's own records, as of not as much force as the necessity for speedy justice.

It will be urged that in some cases the defendant will have judgment against him without a hearing. This is undoubtedly true, though the cases will be few. The defendant, however, has his remedy by an action against the marshal for a false return. It will be replied that this gives the defendant but slow justice. The answer is that it is better for justice to be delayed in the few cases where there is a false return, than in the many cases where the claim would be made without foundation.

Most legal rules rest on a balancing of interests. We submit that the interest of speedy justice for the majority of litigants must outweigh the temporary injustice in the rare case of a false return.

Moreover, if the only remedy is against the officer for a false return, he will tend to be very careful. This is pointed out in *Smoot v. Judd,* 184 Mo. 508.

It has been urged that a distinction should be made when the facts of the return are not within the personal knowledge of the officer, but where he derives his knowledge from others, as in the instant case, whether the person served was an adult person who

was a member of or resident in the family of the defendant. In every case, however, the return must rest on information derived from others as to the facts. Take the simplest possible case. The marshal is given a subpoena to serve on John Doe. He returns that he served John Doe personally. He must derive this information from others. He must determine whether the person served really is John Doe, or whether, perhaps, he is not Richard Roe. What the law does is to confide to him the task of finding out. This argument is admirably stated by the late Judge Baker in *Joseph v. New Albany Steam Mill Co.*, 53 Fed. 180, 181, quoted *infra*.

In the lower court counsel for Jasper Thomason invoked the argument *ad hominem*, and used the present case as an instance of the injustice of the rule of conclusiveness, saying: "Otherwise parties may, as in the instant case, be adjudged guilty of the 'gravest frauds' without ever having had a hearing before the court and without in fact knowing of the pendency of the proceeding." We challenge the statement that Jasper Thomason had no knowledge of the proceedings, and shall discuss that question at length *infra*. But indeed the instant case is an example of the necessity for the rule of the conclusiveness of the return. Jasper Thomason's whole family was involved in the frauds perpetrated upon plaintiff. His son-in-law was found guilty after a trial on the merits of conceiving the conspiracy. [Tr. 102, 228.] Thomason participated in it. [Tr. 103, 228.] His daughter,

who was a witness at the trial, made a false affidavit of service. [Tr. 66, 67, 228.] This same daughter at the trial testified that at the time of trial Jasper Thomason was somewhere in Kern county, California, at a location which no one knew, but that she, Meryle Thomason Davis, had talked to him during the previous week. [Tr. 250, 251.] With confidence we assert that the instant case is an illustration of the danger of not holding the marshal's return to be conclusive. After seven years of litigation, after fighting the case to a finish through the other members of his family and losing, Jasper Thomason now comes in and says: "My daughter was not eighteen; she was seventeen years and four months. The decree must be set aside, so that I may have the benefit of the Statute of Limitations."

We turn now to a review of the authorities.

Joseph v. New Albany Steam Mill Co., 53 Fed. 180 (Circuit Court Indiana), was a suit to foreclose a pledge of choses in action and for other equitable relief. A subpoena in chancery was issued to the marshal, upon which he made a return to the effect that he had served the same upon one John Marsh, agent of the defendant in custody of its property and in charge of its office. A copy of the return is set forth in the opinion. The defendant moved to quash the return on the ground that said Marsh was not its agent or in its employ at the time the writ was served. This motion was overruled. Judge Baker said at page 181:

"Whatever may be the rule in other states in regard to the effect of the return of an officer in executing mesne or final process, I think it is the settled law in this state that the return of a sheriff showing that he has served the writ in the manner prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against a collateral attack. (Citing cases.)

"It is argued that while the return may be conclusive for the purpose of conferring jurisdiction, where the facts stated in the return are within the personal knowledge of the officer, it ought not to have such conclusive effect where the facts stated in such return presumably rest upon information derived from others. In my opinion, where the facts stated in the return are such as the law requires the officer to ascertain and return under his oath of office, the manner in which he has ascertained the facts is immaterial. In every instance of the personal service of process, the officer must determine that the person served is the identical person named in his writ. So, where service is made by copy left at the defendant's last and usual place of residence, the officer must determine the identity of the party, and that the place where the copy is left is the last and usual place of residence of such party. The law has imposed the duty of ascertaining these facts upon the sheriff, and whether he finds and returns the facts from personal knowledge or otherwise, it makes no difference in the rule of law. (Citing cases.) If it were open to a party to contradict the sheriff's return collaterally, in every case where the facts returned by him did not lie within his personal knowledge,

it would open the door to endless conflict and confusion. The law in this state is firmly settled that the facts which the sheriff is required by law to ascertain and return in obedience to his writ, when so ascertained and returned by him, cannot be impeached collaterally, by a resident of the state, for the purpose of quashing the service and return and ousting the court of jurisdiction, by showing that the facts exhibited in the return are untrue."

Frank Parmelee Co. v. Aetna Life Ins. Co., 166 Fed 741 (C. C. A., 7th Circuit), should be considered with the Joseph case. Plaintiff sued defendant upon a policy of liability insurance. The policy required the assured in case of suit to mail the summons to the insurance company. The declaration alleged that suit was brought against the assured, and that a return was made by the sheriff that service had been made upon one, Gany, the secretary of the assured. That Gany was not secretary nor agent of the assured. That the assured discovered the pendency of the suit, notified the insurance company of all the facts, and on the insurance company's refusal to defend, the assured defended and lost. Defendant demurred on the ground that since the return of summons in the case against the assured could not be attacked by the assured, the condition of the policy had been violated. The demurrer was sustained, and plaintiff appealed. There was a reversal on the grounds that (1) the return could have been attacked, and (2) plaintiff substantially complied with the condition of the policy by notifying defendant of the facts.

It would seem that the case must be rested on the second ground. The court recognized the authority of *Joseph v. New Albany Steam Mill Co.,* and said that case was different (pp. 743, 744). But both cases involved impeaching the return by showing that a certain person was not the agent of the defendant. The question, however, arose collaterally in *Frank Parmelee Co. v. Aetna Life Ins. Co.,* and that undoubtedly is its explanation; namely, that the question did not arise between the parties to the suit in which the return was made. Since the court recognized the *Joseph* case, the *Parmelee* case should be so explained or rested upon the second ground assigned by the court for its decision.

In *Von Roy v. Blackman,* Fed. Cas. No. 16,997, there was a suit in equity in which defendant by plea in abatement objected to the sufficiency and legality of the service of process upon her. The court (Circuit Court, District of Louisiana) in declaring the plea bad, said:

> "The authorities are numerous and weighty in support of the proposition, that in the same case the parties cannot question the return of the officer: Benn & H. Dig. tit. 'Officer,' subd. 5; *Id.* 'Return of Officers'; Lawrence v. Pond, 17 Mass. 432; Com. Dig. tit. 'Return,' F, 2; Barr v. Satchwell, 2 Strange, 813; 2 Phil. Ev. (Ed. 1859, Cowan & Hill's Notes) 370; 3 Bouv. Inst. 190, 2795; Cow. Treat, 335 art. 867; Goubot v. De Crouy, 1 Cromp & M. 773; Putnam v. Man, 3 Wend. 202; Case v. Redfield, 7 Wend. 339;

Evans v. Parker, 20 Wend. 622. I have endeavored to find cases which would support the proposition urged by the defendants, that where a fact involving an opinion was returned by the sheriff, there might be an exception to the rule that the return could not be denied. But the principle seems to be settled, that as to parties and privies, the return of the sheriff, as to any fact which he was bound to return, is conclusive. In Lawrence v. Pond, *supra,* the return was as to the qualifications of the appraisers of land taken on exception. In Goubot v. De Crouy, 1 Cromp. & M. 772, the return was 'that the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant.' Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; that he had been taken and collusively discharged by the officer. The court says: 'We cannot interfere upon motion; your only course is by bringing an action against the sheriff for false return.' In Case v. Redfield, *supra,* evidence was offered that a copy of the attachment was not left at the dwelling-house, or last place of abode of the defendant, and it was excluded. In the case of Van Rensselaer v. Chadwick, 7 How. Prac. 297, the court seems to hold that the return of the sheriff is not conclusive, and may be contradicted. This would be in opposition to the other cases which I find, and they are so numerous that I have no doubt upon the subject. In the case of Earle v. Mc-

> Veigh, 91 U. S. 503, I am satisfied that the decision, so far as it involves the question here presented, was based upon the ground that the impeachment of the return was in a second suit. The plea is therefore bad, since it traverses the return of the marshal in the same cause in which it is made."

The court then went on to hold that although the plea was bad, the return was defective on its face; so further proceedings were stayed until there was a new return of service.

Trimble v. Erie Electric Motor Co., 89 Fed. 51 (C. C. Pa.), is a square authority in favor of the contention of appellant.

Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843 (D. C. Pa.) holds that the facts can be inquired into when the return is not self-supporting, but that when the return is self-supporting it is conclusive.

At common law the rule of conclusiveness was undoubted (19 Vin. Abr. 195). The law of England has always been settled that the sheriff's return is conclusive. (See the quotations from *Gwynne on Sheriffs* and from *Smith's Leading Cases, infra.*)

The state decisions are in conflict. In many states the question is governed by statute. The Supreme Court of the United States has held that neither the statutes nor decisions of the state courts need be followed on this question by the federal courts. (*Mechanical Appliance Company v. Castleman*, 215 U. S. 437, 442, 443.)

The long opinion in *Smoot v. Judd,* 184 Mo. 508, contains a splendid collection of authorities. The question arose on a bill in equity to set aside a judgment at law. This would seem to be immaterial, but at all events the cases where the attack on the return was in the court of law are also reviewed.

The court said at page 518:

> "Ever since the decision of this court in Hallowell v. Page, 24 Mo. 590, the law has been uniformly declared in this state to be that 'the return of a sheriff on process, regular on its face, and showing the fact and mode of service, is conclusive upon the parties to the suit. Its truth can be controverted only in a direct action against the sheriff for false return.' [Heath v. Railroad, 83 Mo. 617; Decker v. Armstrong, 87 Mo. 316; Phillips v. Evans, 64 Mo. 1, c. 23; State *ex rel.* v. Finn, 100 Mo. 429; Delinger's Admr. v. Higgins, 26 Mo. 1, c. 183; McDonald v. Leewright, 31 Mo. 29; Reeves v. Reeves, 33 Mo. 28; Stewart v. Stringer, 41 Mo. 1, c. 404; Jeffries v. Wright, 51 Mo. 215; Magrew v. Foster, 54 Mo. 258; Anthony to Use, etc., v. Bartholow, 69 Mo. 1, c. 194; Bank v. Suman, 79 Mo. 1, c. 532. (In this case it was held that parol evidence was inadmissible in aid or support of the return, to show service in fact, though not in the manner set out in the return, and was admissible against the return only in a suit against the sheriff for a false return); Bank to Use v. Gilpin, 105 Mo. 1, c. 23; Feurt v. Caster, 174 Mo. 1, c. 297.]"

And at 519 and 520 the court said:

"Gwynne on Sheriffs, page 473, thus states the law: 'It is a well-settled principle of the English law that the sheriff's return is not traversable, and the court will not try on affidavits, whether the return of a sheriff to a writ is false, even though a strong case is made out, showing fraud and collusion, but the party must resort to his remedy by an action against the sheriff for a false return. In Connecticut, the return of the sheriff on mesne process is held to be only *prima facie* evidence, but even in that state he cannot falsify it by his own evidence. In most, and probably in all, of the other states in the United States, the rule is established that as between parties to the suit, in which the return is made, and privies, and the officer, except when the latter is charged in a direct proceeding against him for a false return, the sheriff's return is conclusive and cannot be impeached. A party or privy may not aver the falsity of a return made by a proper officer, without a direct proceeding against the officer, even in chancery."

And at 530 the court said:

"The annotators of Smith's Leading Cases, Hare and Wallace (1 Smith's L. C. 842), sum up the law on this subject as follows: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established, by a weight of authority too great for opposition, unless the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff, in the

record of a domestic court of general jurisdiction, is absolutely conclusive, and cannot be disproved by extrinsic evidence.' "

In *Frank P. Miller Paper Co. v. Keystone Coal Co.,* 110 Atl. 79 (Sup. Ct. Pa.), which is in point on the facts, the court said at page 79:

> "In the absence of fraud, which is not here alleged, a sheriff's return, full and complete on its face, is conclusive upon the parties and cannot be set aside on extrinsic evidence." (Citing many cases.)

In *Tillman v. Davis,* 28 Ga. 494, the court held that a return of service on the writ by the sheriff cannot be traversed, except for fraud or collusion. Lumpkin, J., said at pages 497 and 498:

> " 'The return of the sheriff,' says Baron Comyn, 'is of such high regard, that generally no averment shall be admitted against it. As if A. be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus.* Kit., 280. If the sheriff return issues upon B., it cannot be averred by A. to save the issues, that his name is not B.—2 Rol., 462, l. 5. If the sheriff in *re-disseisin* returns *accessi ad terras, etc.,* it cannot be assigned for error, *quod non accessit*—Leon., 183. If *coronors* make a return it cannot be said that only *one* made the return.—R. Raymond, 485. If a sheriff returns *scire feci* A. tennen' un' mess', A. cannot plead *non tenet.* R. Cro. Eliz., 872; R. Mod. 10 (Com. Dig. Title Retorn G. 6 vol., 242-243).

"Sheriffs' return not traversable; but you may have an action for a false return.—Loft., 631; Rex v. Elkins, 4 Burr, 2127; Barr v. Satchwell, 2 Str., 813.

"But I will not multiply citations upon this point. I have investigated carefully in Brooke and Viner's abridgments, and traced the question to its fountain head, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others is, that he is a sworn officer, to whom the law gives credit. Jenk. 143, pl. 98. There are some exceptions to the general rule in favor of life and liberty, and some modifications made by several ancient statutes. But they are slight and restricted to returns upon particular subjects, and do not affect the present case. It is also true, that while the return of the sheriff, in certain cases, will not be allowed to be controverted in the same action, an averment may be made contrary to the same return in another action.

"I lay down another proposition, which seems to be uniform and incontrovertible: that a return of the sheriff which is definitive to the trial of the thing returned, as the return of the sheriff upon his writs, cannot be traversed. Brook's Abr. Title Averment; Viner's Abr. Title Return, vol. XIX.

"All the American authorities are collected in note (d.) appendix to vol. 2, Cowen & Hill's notes to Phillips on Ev., p. 794, and, as I stated in the beginning of this opinion, with a solitary exception, there is an unbroken array of American

cases in favor of the well-established English rule, that as between the parties to the process or their privies, the return of the sheriff is usually conclusive, and not liable to collateral impeachment, except for fraud or collusion; a rule so necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return; and that this rule concluding the parties, applied to mesne process, by which the parties are brought into court."

There was a dissenting opinion. The law of Georgia seems to have been changed by the Georgia code. (See *Jinks v. American Mortgage Company*, 102 Ga. 694-695.)

See, also, the following authorities sustaining the rule of conclusiveness:

Sutherland v. People's Bank, 69 S. E. 341 (Sup. Ct. Va.);
Hallowell v. Page, 24 Mo. 590;
Angell v. Bowler, 3 R. I. 77;
St. Louis etc. Co. ex. Parte Petition, 40 Ark 141;
The State to Use of O'Neill, 4 Mo. App. 221;
Preston v. Kindrick, 94 Va. 760.

Blythe v. Hinckley, 84 Fed. 228 (C. C. Cal.), a decision by Judge Morrow, was heavily relied upon by appellee in the lower court. The return showed service on Florence Blythe Hinckley, by delivering to

and leaving the subpoena "with Mrs. Harry Hinckley, an adult person, who is a resident in the *place of abode* of Florence Blythe Hinckley." The court held that the return was bad on its face, since it did not show that Mrs. Harry Hinckley was a member or resident of the *family* of the defendant, as required by Equity Rule 13. The court showed that if the defendant lived at a hotel, the writ might be delivered to a stranger and be within the words of the return. The court said at page 241 that if it was confined to the face of the return, the service would be insufficient. It then went on to show at pages 241 and 242 that if it went off the face of the return and examined the affidavits filed, the service would still be insufficient. Of course, in such a case the marshal's return could not be held conclusive, because it was not complete and self-supporting on its face. This case cannot be an authority for defendant in any event, because it was not a motion to vacate, but to let in and defend. (See p. 240 and Point I. B. *infra*.)

Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245 (C. C. E. D. Mo. E. D.); *Mechanical Appliance Company v. Castleman,* 215 U. S. 437, and *Higham v. Iowa State Travelers' Assn.,* 183 Fed. 845 (C. C. W. D. Mo. W. D.), are all cases where a corporation objected to the service because it was not doing business in the state. In such cases, of course, the marshal's return was held not conclusive, because the defendant was never within the boundaries of the sovereign. Territorial jurisdiction had not attached.

The following quotation from Foster's Federal Practice, section 167a, was relied upon by appellant in the court below:

> "If the marshal or his deputy make the service, his unverified return is sufficient. This may be contradicted, although there is a remedy by an action against the officer for a false return. The marshal's return, that the corporation served was transacting business within the district, can be contradicted; so can his return that the person on whom the service was made was authorized to represent the defendant for that purpose."

This quotation is based on the federal authorities discussed *supra*, and on some other cases not in point. We submit that the cases cited do not sustain the broad language of the text. The language must be limited.

Bradley v. Burrhus, 135 Iowa 324, was relied on by appellee in the lower court as directly in point. It is in point on the facts, but the question of the conclusiveness of the marshal's return does not seem to have been raised or discussed.

Many other cases could be cited for the rule, and some against it. Some of the cases departing from the strict rule of conclusiveness will be found under Point I. B. The authorities cannot be reconciled, but we submit that the rule of conclusiveness is the better one, because:

1. On a balance of interests, the necessity of speedy justice for the majority of litigants outweighs

the inconvenience of slow justice to the few in the rare case of a false return.

2. The records of the court import verity.

3. The return of the court's sworn officer should be conclusive.

4. The rule of conclusiveness tends to make the marshal careful.

5. The danger of subjecting judicial records to the slippery memories of interested witnesses is too great.

6. The defendant has his remedy by an action for a false return against the marshal.

B. *If the court refuses to adopt the rule of conclusiveness of the marshal's return as urged by appellant under Point I. A., it should at least adopt the rule in a modified form. Where territorial jurisdiction is admitted, and the marshal's return is complete and self-supporting on its face, the court should not vacate the decree founded on that return, unless the defendant shows absence of laches and a meritorious defense and offers to waive the statute of limitations, and come in to defend.*

Appellant believes that the rule should be established by this court that wherever the marshal's return is complete and self-supporting on its face and territorial jurisdiction is admitted, the return is conclusive. If the court does not agree with appellant, we believe that the court should adopt the rule in a modified form.

A defendant comes into court, as in this case, and attacks a record faultless on its face. There is a valid decree and a complete and self-supporting return of service on which to found it. But, says the defendant, the return of the court's officer is untrue; no service was in fact made upon me. To this the court should answer: The face of the record shows you were served. We will not go off the face of the record, unless you show us that you moved promptly as soon as you had knowledge of the suit, and unless you show a meritorious defense which you wish to set up, and offer to waive the statute of limitations.

In the case at bar defendant is attacking a record flawless on its face. If he wishes the court to go off the record, he should present equitable grounds to justify it in so doing. We submit he has not done so. His motion and affidavits will be searched in vain for any statement that he has a meritorious defense, or for any request to set it up. On the contrary, he asks the court not to open the decree, but to vacate it. He makes no offer to waive the statute of limitations.

Nor does he show lack of knowledge of the suit. The order *pro confesso* was entered October 12, 1923. [Tr. 221.] The motion was made April 15, 1925. [Tr. 151.] We believe that it is perfectly apparent even on the defendant's own showing that Jasper Thomason had notice of the suit and was in touch with it at all times.

In his affidavit Jasper Thomason carefully refrains from saying that he had no notice of the suit, nor does he say that the subpoena was not delivered to him. He simply says that neither the marshal nor his deputy delivered the subpoena to him. [Tr. 153.] Rosamond Mildred likewise in her first affidavit confines herself to the statement "and that the said copy of subpoena was not, nor was any copy thereof, so far as affiant knows, delivered by the said Walton to her father, Jasper Thomason." [Tr. 158.] In a later affidavit she says that "she verily believes the said subpoena never came into the possession of her said father at any time." [Tr. 259.] Mrs. Thomason says in a later affidavit (not in the one filed with the motion):

"That affiant never saw the said subpoena so attempted to be served nor did she ever know of its delivery by any person to the defendant, Jasper Thomason, but affiant verily believes that the said subpoena was not delivered to him, nor did it ever come into his possession." [Tr. 308.]

On defendant's own showing then it nowhere appears that Jasper Thomason had no notice of the suit. Nor does it appear, except from the "belief" of his wife and daughter, that he never received the subpoena.

It seems clear that Thomason knew all about the suit. His family was involved in it. His son-in-law was the one who conceived the conspiracy. [Tr. 102, 228.] His daughter made the false affidavit of service. [Tr. 66, 67, 128.] Rosamond Mildred talked over her interview with the marshal, according to her story, with her sister, Mrs. Davis, and her aunt. [Tr. 299.]

It must have been the subject of family discussion. On August 26, 1923, Mrs. Davis and Jasper Thomason, her father, went on a six weeks' automobile trip to Reno, Nevada. [Tr. 254, 255.] This was after Walton's service. Mrs. Davis was a witness at the trial. She testified that her husband was in Mexico, and her father was somewhere in Kern county, at a location which no one knew, but that she had talked to her father during the previous week. [Tr. 250, 251.] So much for Thomason's knowledge.

So we have this case. The defendant seeks to set aside a decree, based on a return complete and self-supporting on its face, with territorial jurisdiction admitted. He makes no effort to show lack of knowledge or due diligence. It appears from a fair reading of the record that he had knowledge. He makes neither a showing of a meritorious defense, nor a request to defend. He does not offer to waive the statute of limitations. He says in effect:

"Set aside the decree. If I am sued again, I'll plead the statute of limitations. I am not asking the court to open the decree and to let me defend. Although I am in a court of equity, I am standing on my strict legal rights. No valid service was made on me, for it is nominated in Equity Rule 13 that the person served must be eighteen, and my daughter lacked eight months of being eighteen. The court, therefore, has no jurisdiction over my person. What I knew is immaterial. Whether I have a meritorious defense is immaterial. Whether the statute of limitations has run is immaterial. The decree is void, and must be vacated."

To this the court should reply:

"You are mistaken. The decree is not void. On its face it is regular in every respect, and the return on which it is based is complete and self-supporting. To prove otherwise you must impeach the verity of the return by evidence *dehors* the record. In support of your right to do so, you must invoke the fact that it would be unjust and inequitable not to permit you to show the return is false. Every party, you say, is entitled to his day in court. But we ask you who ask justice, are you willing to grant it? You do not show a meritorious defense. You do not show diligence. You do not ask for your day in court. You ask in effect to put the statute of limitations between you and justice. In such a case, we will not go off the face of the record."

If a defendant is to be permitted to impeach a decree supported by the sworn return of an officer of the court, self-supporting on its face, where territorial jurisdiction is granted, he should be allowed to do so only where he has shown due diligence, and has a meritorious defense which he asks to set up.

No argument has ever been made against the rule of conclusiveness except the injustice of denying a man his day in court. When he is not asking for his day in court, and not asking for justice, but is petitioning the court to place the statute of limitations between him and plaintiff's just cause of action, the rule of conclusiveness should certainly be applied.

In this connection, we wish to point out another reason why cases where there is no territorial juris-

diction are an exception. In such case the defendant has not only a right to his day in court, but also the right to be sued in his own court. He should not be required to defend in the courts of another jurisdiction.

The rule of conclusiveness in the absence of a showing of meritorious defense and due diligence, in other words, where defendant is not in good faith seeking his day in court, has been well set forth in two well-reasoned Arkansas cases.

In *St. Louis etc. Ry. Co., Ex Parte* 40 Ark. 141, a default judgment was rendered against the defendant. It sought to quash the judgment by showing that the person served was not its agent, in contradiction of the sheriff's return. The court held that it could not do this, saying at page 143:

> "The sheriff asserts that he left a copy of the writ with Kenna, and that Kenna was then the agent of the defendant. If this was not so, the remedy is by action against the sheriff for a false return. But the truth of the return could not be controverted either in that action or in a review upon certiorari."

In *Wells Fargo & Company v. Baker Lumber Co.,* 107 Ark. 415, 155 S. W. 122, the defendant sought leave to be let in to defend, after a default, alleging no notice, due diligence, and a meritorious defense. For this purpose defendant sought to contradict the sheriff's return. The court said at pages 422 and 423:

> "It is also true, this court held in *Ry. Ex Parte,* 40 Ark. 141, in a case of a default judgment, that

the truth of the sheriff's return upon a copy of the writ could not be controverted either in the action or in a review upon *certiorari.*

"But it has further held, however, that an officer's false return of service of process shall not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment based thereon.

" 'Evidence tending to contradict the record is heard in such cases, not for the purpose of nullifying the officer's return but to show that by the judgment the defendant has been deprived of the opportunity to assert his legal rights without fault of his and that it would be unfair to allow the judgment to stand without affording him the chance to do so. The principle that affords relief to one that has been summoned, but has been prevented through unavoidable casualty from attending the trial governs.' *State v. Hill,* 50 Ark. 461; see, also, *Kolb v. Raisor,* 47 N. E. 177; *Locke v. Locke,* 30 Atl. Rep. 422; *Cook v. Haungs,* 113 Ill. App. 501; *Clough v. Moore,* 63 N. H. 111; *Carr v. Bank,* 16 Wis. 52.

"Appellant was not entitled to show the falsity of the officer's return to defeat the jurisdiction of the court rendering the judgment under the doctrine of the cases above cited, but only to excuse its failure to make its defense at the time of the trial and prevent its being compelled to submit to a judgment and have its rights unjustly concluded without an opportunity to be heard.

"The testimony is well-nigh conclusive that the summons was not served upon an agent of the express company, as the return shows it to have

> been, both persons who had been agents denying that it was served upon them and the sheriff not being able to say upon whom it was served; but only that he delivered the copy to a man who said he was agent, whom he could not identify as either man who had been agent there, and the testimony shows further that the company had no notice in fact of the bringing of this suit, nor the service of summons, and that as soon as it had information that a default judgment had been taken against it, immediately and without delay, shortly thereafter, and at the same term of the court, it moved to set aside the judgment and that it have an opportunity to make its defense to the suit, which was alleged to be a good one." (Italics ours.)

It will be readily seen that these two cases lay down a modified rule of conclusiveness. When the defendant is seeking to set aside the judgment and is standing on his strict legal rights, there is no reason to relax the common law rule of conclusiveness. The only possible reason for relaxing it is the injustice of defendant not having his day in court. But when he is not seeking his day in court, let the record stand. If, however, the defendant, who has used diligence, is seeking his day in court, the court will ascertain whether the record speaks the truth.

The same distinction is drawn by the Indiana cases.

In *Nichols v. Nichols,* 96 Ind. 433, the court laid down the absolute rule of conclusiveness, saying at 435:

> "A complaint to set aside a default and judgment, in order to be good, must specifically allege a defense; a general charge that the complaint, in relation to the land, 'was wholly wrongful and without any foundation,' is not sufficient. *Lake v. Jones,* 49 Ind. 297; *Bristor v. Galvin,* 62 Ind. 352; *Slagle v. Bodmer,* 75 Ind. 330; *Lee v. Basey,* 85 Ind. 543. But there is a more fatal objection urged to this complaint; it seeks to contradict the return of the sheriff upon the summons. This can not be done. The return of the sheriff of service upon the summons is conclusive against the defendant in the action."

In *Neitert v. Trentman,* 104 Ind. 390, 4 N. E. 306, the Supreme Court of Indiana departed from the absolute rule of conclusiveness and adopted the modified rule. There the defendant sought to set aside a default judgment by contradicting the sheriff's return. He alleged due diligence and a meritorious defense, which he asked leave to assert. The court limited *Nichols v. Nichols* to a case where defendant was seeking to defeat the jurisdiction, and refused to apply it to a case where defendant sought to make a defense. The court said at 308:

> "If a default may be taken against a defendant who has not been really served with summons, upon a false return of the sheriff, and if such want of actual service of the summons cannot be urged as a reason for setting aside the default, then injuries may be inflicted upon defendants in many cases for which an action against the sheriff would afford no adequate remedy. The object of this proceeding is neither to set aside the service

> of the summons, nor to question the jurisdiction which the Circuit Court acquired over the appellant in virtue of the sheriff's return, but is simply and only to have a default, taken against the appellant during the progress of the cause, set aside upon the ground that, up to that time, he had no actual knowledge of the pendency of the action against him, and that hence his neglect in not appearing in time to make his defense was excusable. The facts averred constitute what appears to us to be a well-sustained case of excusable neglect on the part of the appellant."

Two judges dissented in favor of the absolute rule of conclusiveness. After reargument the court stuck to its position, the two judges again dissenting.

See, also:

Groff v. Warner, 89 N. E. 609 (Ind. App.).

Shepherd v. Marvel, 45 N. E. 526 (Ind. App.), draws the same distinction.

In Cully v. Shirk, 30 N. E. 882 (Ind. Sup.), defendant sought to vacate the judgment by contradicting the sheriff's return, not to make a defense. The court reaffirmed the doctrine of *Nichols v. Nichols* and limited *Neitert v. Trentman* to a case where defendant was seeking to defend.

In *Angell v. Bowler,* 3 R. I. 77, and in *Locke v. Locke,* 30 Atl. 422, the Rhode Island court drew the same distinction. The sheriff's return is conclusive when defendant seeks to contest the jurisdiction; it is

otherwise when a diligent defendant seeks his day in court.

In *Cooke v. Haungs*, 113 Ill. App. 501, the court said at pages 501 and 502:

> "Mr. Justice Baker delivered the opinion of the court.
>
> "At the September term, 1902, of the Circuit Court, appellee entered the default of appellant and obtained a final decree against her and others for a mechanic's lien for $176. Appellant at the same term moved the court to set aside the default and vacate the decree as to her and grant her leave to plead, demur or answer. In support of her motion she filed several affidavits from which it clearly appeared that the person with whom a copy of the summons was left for appellant was not a member of the family of appellant, nor was such copy left at the usual place of abode of appellant, as stated in the return of the sheriff, and that appellant had no knowledge of such attempted service until after the decree was entered and then promptly moved to vacate the same. The court continued the hearing of appellant's motion to the October term and then denied it and from the order denying the motion this appeal is prosecuted.
>
> "The strict rule of the common law as to the conclusiveness of the return of service of summons or other process, by a sheriff or other officer, has been somewhat relaxed. In Scrafield v. Sheller, 18 Ill. App. 507-506, Mr. Justice McAllister said: 'We hold that while the officer's return cannot be contradicted so as to defeat jurisdiction, yet it may be done to excuse a default.' "

In *Massachusetts Benefit Life Ass'n v. Lohmiller,* 74 Fed. 23 (C. C. A., 7th Cir.), complainant corporation brought a bill in equity seeking to enjoin the enforcement of a judgment at law and to have it declared void because of the fact that service was not upon a person who was its agent and also upon the ground of fraud. The return showed good service. The bill failed to aver due diligence and a meritorious defense. The court first pointed out that the bill was bad because it did not aver lack of knowledge. The court went on at pages 28 and 29:

> "The bill is silent in another respect, of which these principles of equity generally require clear expression before relief can be extended. There is no impeachment of the cause of action upon which the judgment was rendered, nor suggestion of defense in whole or in part; and, for all that appears in the record, the policy of life insurance referred to in the bill, and set out in the answer, is an undisputed and matured obligation against the complainant, and justly enforceable as adjudged. If that is the true situation, interference would serve only 'the unworthy purpose of delaying, vexing and harassing suitors at law in the prosecution of their just demands,' so pertinently denounced in Truly v. Wanzer, *supra*. It furthermore appears from the terms of the policy that it limits the time within which suit may be brought thereon, and that such time has expired. There is no suggestion in the bill of any waiver of the limitation, and, unless waiver were imposed by the court as a condition of interference, the right of action would probably be barred. The rule is in-

variable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can 'aver and prove that it had a good defense upon the merits.' White v. Crow, 110 U. S. 183, 187, 4 Sup. Ct. 71, citing Ableman v. Roth, 12 Wis. 81, and other cases; Freem., Judgm., §498; 1 High, Inj., §228. Ableman v. Roth, *supra,* is a leading case upon this subject, and Chief Justice Dixon there says:

" 'Courts of equity will not interfere to grant a new trial where no substantial right has been lost, and no unfair advantage gained, simply because, by some trick or artifice, a judgment which is just and equitable in itself has been obtained in advance of the time when it would otherwise have been rendered.'

"The authorities are not in unison in holding the same rule where the judgment was obtained without service of process, and where the defendant had no opportunity to be heard. In some jurisdictions it is maintained that the defendant will not be required to show a good defense in such case, the judgment being void, and the reasons therefor are variously stated, namely, that 'there is no presumption in favor of the judgment creditor,' and 'neither reason nor sound policy will require a defendant so imposed upon to try the merits of the cause on a petition in chancery to set aside the judgment'; 'that the injury of which he justly complains is that a judgment was rendered against him without notice and without defense.' Blakeslee v. Murphy, 44 Conn. 188; Ridgeway v. Bank, 11 Humph. 523; Bell v. Williams, 1 Head 229; Finney v. Clark, 86 Va. 354, 10 S. E. 569. And in Dobbins v. McNamara, 113

Ind. 54, 14 N. E. 887, and Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, the same view is held, but apparently grounded upon the rule which there governs in the law courts to open such judgments without inquiry into the merits. The preponderance of authority in the state courts is, however, the other way, and upholds the rule 'that equity will not interfere until it appears that the result will be other or different from that already reached.' Freem., Judgm., §498; Taggart v. Wood, 20 Iowa 236; Gerrish v. Seaton, 73 Iowa 15, 34 N. W. 485; Stokes v. Knarr, 11 Wis. 389; Harris v. Gwin, 10 Smedes & M. 563; Stewart v. Brooks, 62 Miss. 492; Secor v. Woodward, 8 Ala. 500; Dunklin v. Wilson, 64 Ala. 162; State v. Hill, 50 Ark. 458, S. W. 401, disaffirming Ryan v. Boyd, 33 Ark. 778; Gifford v. Morrison, 37 Ohio St. 502; Wilson v. Hawthorne, 14 Colo. 530, 24 Pac. 548; Sharp v. Schmidt, 62 Tex. 263; Pilger v. Torrence, 42 Neb. 903, 61 N. W. 99; Colson v. Leitch, 110 Ill. 504. No such exception to the general rule appears to have found recognition in the practice of the federal courts, and its incorporation would not harmonize with the principle that equity will not enforce rights upon grounds which are wholly legal or technical, nor 'grant an injunction to stay proceedings at law merely on account of any defeat of jurisdiction of the court.' 2 Story, Eq. Jur., §898."

It would seem clear that the same principle would restrain a court of equity from setting aside its own decree based on a sufficient return without a showing of diligence, a meritorious defense, and a waiver of limitations.

Massachusetts Benefit Life Assn. v. Lohmiller was cited with approval by this Court in *Cowden v. Wild Goose Mining & Trading Co.,* 199 Fed. 561, 565, in a case where this court also required a showing of due diligence, even where the agent who received the service was not the agent of the corporation authorized to receive service.

In this connection we wish to call attention to the fact that *Blythe v. Hinckley,* 84 Fed. 228 (C. C., Cal.), *supra,* so heavily relied on by the defendant in the court below, was not a motion to vacate but to be let in to defend. Judge Morrow said at page 246:

> "But this doctrine does not control the discretion of the court in opening a decree obtained by default for the purpose of permitting a defense on the merits. Indeed, it has been held 'that a meritorious defense and a reasonable degree of diligence in making it are all that it is necessary to establish, in order to justify the setting aside of an interlocutory judgment.' Adams v. Hickman, 43 Mo. 168."

See, also, the attitude taken by the Supreme Court in *Martin v. Gray,* 142 U. S. 236.

In *Gregory v. Ford,* 14 Cal. 138, the California court laid down the same principle. A bill was filed to vacate a judgment because of a false return. The court refused relief because there was no showing of a meritorious defense. The court said at page 142:

> "The case then on the pleadings and proofs resolves itself into this proposition of law: Can a defendant having no defense to an action, enjoin

a judgment by default obtained on a return by the sheriff of service of process, upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff for a false return, under such circumstances as to relieve him from the judgment and turn the plaintiff for redress to the sheriff. For the effect of vacating the judgment now, would be to release the defendant from the debt, as the statute of limitations has intervened. Courts of equity do not interfere with the judgments and proceedings of the courts of law, except in peculiar cases. They do not interpose to correct the errors of irregularities of the law courts.

* * * * * * * *

"A court of chancery, too, looks well to the consequences of its acts, and the case must indeed be a strong one, which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt, which he does not deny to be justly due."

Gregory v. Ford was cited with approval as late as 1920 in *Hawley v. State Assurance Co.,* 182 Cal. 111, 113, where it was sought to set aside a decree of foreclosure based on a false return and an unauthorized appearance. The court refused to set aside the decree in the absence of a showing of a meritorious defense, citing many cases in support of its position.

See, also:

State v. Hill, 50 Ark. 458.

In *Hilton v. Thurston,* 1 Abb. Prac. (N. Y.) 318, the same rule is asserted. The court in speaking of a defendant's delay after knowledge, said:

> "Such a course the court will not countenance. It has long been the established practice of the court that a party must make his application at the earliest practicable opportunity after the irregularity of which he complains has taken place, and not knowingly suffer further proceedings to be taken."

We now turn to a review of the cases cited by appellee in the court below. On examination we believe none of these cases will sustain the position appellee must take in order to sustain the order setting aside the decree. Appellee must contend that a court of equity on motion of the defendant will set aside a decree rendered by it, which is supported by a return by a sworn officer of the court, complete and self-supporting on its face, with territorial jurisdiction admitted, on the ground that the return is false:

1—without defendant's asking leave to make a meritorious defense, and

2—without a showing of a meritorious defense, and

3—without a showing of due diligence, and

4—where knowledge of the suit, and inaction, nevertheless, affirmatively appears, and

5—without any waiver of limitations.

In *National Metal Co. v. Greene Consolidated Co.,* 11 Ariz. 108, it is held that a foreign corporation not doing business in the state can enjoin the enforcement of a judgment for lack of service upon it, even though the return of the sheriff showed service. Of course, this is a case where there was no territorial jurisdiction and in such case the return of the sheriff has never been held conclusive. Moreover, the complaint seeking the injunction showed due diligence and a meritorious defense.

Wilmer v. Pico, 118 Md. 543, was a garnishment case. The defendant garnishee evidently was acting in good faith in the case and asked an injunction against the garnishment *because she did not owe anything.* She knew of the garnishment, but her daughter was assured by the justice of the peace who issued the writ and who had offices with the plaintiff in the principal suit that nothing need be done. She offered to show that she owed nothing and made a showing of diligence. The injunction was granted.

In *Caldwell v. Glenn*, 6 Rob. (La.) 9, there was no service of a proper citation. *This showed on the face of the record.* The court held that the court below should not have given judgment but should have issued a new citation.

In *Osborne v. Columbia Co. Farmers' Alliance Corp.*, 38 Pac. 160 (Sup. Ct. of Washington), service was made on the wrong agent of a domestic corporation. It was held that the corporation could set the judgment aside though it knew of the suit. The court said that the defendant was not guilty of laches since it made application in the time provided by statute and on one of the grounds provided by statute. *What the return was does not appear nor whether there was an attack on the return. Moreover, it does not appear whether or not the defect was apparent on the face of the record.*

In *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, the X corporation was garnishee in an action. The return of the sheriff showed service on A, secretary of the X corporation. There was a judgment by default against the garnishee. The corporation brought an action to set aside the judgment. The petition alleged that the writ of garnishment was not served upon the corporation as the return showed because A was not the secretary of the X corporation. *That the X corporation had no notice of judgment until long after the term of court at which it was returned and that the corporation had a meritorious defense. The question*

of the conclusiveness of the return was not raised. The X corporation succeeded in maintaining its suit. The court did say, in the course of its opinion, that knowledge of the pendency of the former suit was immaterial. It will be noticed, however, that the X corporation alleged a meritorious defense and that the question of the conclusiveness of the return was not raised.

In *Bradley Mfg. Co. v. Burrhus,* 135 Iowa 324, there was a motion to set aside a false return. The court said that knowledge of the suit was immaterial. But there the defendant tendered with his motion to set aside the default an answer on the merits, which he prayed leave to interpose. Moreover, the question of conclusiveness was not discussed.

In *Savings Bank of St. Paul v. Authier,* 52 Minn. 98, the return showed good service. The defendant made a motion supported by affidavit from which it appeared that there was no service at all. The court set aside the judgment and gave the defendant five days to answer on the defendant's filing bond conditioned on his paying the judgment if he lost, the judgment meanwhile to stand as security. Plaintiff appealed. The upper court affirmed. The court said that the lower court could have set aside the judgment without a showing of a meritorious defense and without the imposition of any conditions. Since it imposed conditions in the plaintiff's favor, he could not complain. No point, however, was raised as to the conclusiveness of the return.

In *Wilcke v. Duross,* 144 Mich. 243, plaintiff filed a bill in equity which seems to have had for its object making a defense in a suit in which there had been a default judgment. The constable's return showed good service. It appeared, however, that the service was made on a daughter of the defendant by the same name. Defendant had knowledge of the suit and did nothing about it. Defendant, however, did allege a meritorious defense. The court held in favor of the plaintiff. No point of conclusiveness was raised. The court denied costs because of the defendant's knowledge and seemed reluctant to reach the result which it seemed to think it was compelled to reach. No doubt had the point of conclusiveness been presented, the case would have gone the other way.

O'Connell v. Gallagher, 104 App. Div. (N. Y.) 492, is not in point because there service was not made by an officer of the court.

In *Kochman v. O'Neill,* 202 Ill. 110, the bill asked for a trial on the merits, averred a meritorious defense, and showed an absence of laches. The court accordingly granted the relief prayed, namely, that the defendant should be allowed to have a trial on the merits.

It seems apparent that the only possible argument against the rule of conclusiveness of the return is that the defendant is entitled to his day in court. When he is not asking for his day in court, and does not aver a meritorious defense and due diligence, it seems apparent that the only reason against the rule falls.

He is asking the court to do an injustice by putting the statute of limitations in the way of plaintiff's just demand. Accordingly in such a case, we submit the rule of conclusiveness should always be applied.

II.

Even if the Court refuses to adopt the rule of conclusiveness, the evidence was insufficient to rebut the Marshal's return supported by his affidavit. Certainly it should not have been impeached without an oral hearing, and an opportunity for cross-examination.

Even if the court declines to adopt the full or modified rule of conclusiveness, nevertheless, the evidence was insufficient to justify setting aside the return.

Even in states where the return may be impeached, it is held that the "strongest" testimony is necessary to overthrow it. So in *Davant v. Carlton*, 53 Ga. 491, the code had abolished the rule that the sheriff's return was conclusive, and had made it subject to traverse. The Supreme Court of Georgia held it was error to refuse to charge the jury that under the law it required the "strongest" evidence to overcome the effect of the sheriff's return, and to charge in lieu thereof that the sheriff's return was *prima facie* evidence, but like other presumptions, it might be rebutted by proof. The Supreme Court said at page 492:

> "It should only be set aside on very satisfactory proof of its incorrectness. It should require the strongest testimony to rebut it."

With this in mind, let us examine the record.

Of course, in an equity case, the appellate court has the whole case before it, and will review the facts as well as the law. (*La Abra Silver Mining Co. v. United States,* 175 U. S. 423, 464, 465, 466.) This is especially clean on this appeal where there was no oral testimony and the judge who set aside the decree was not the judge who heard the case.

We admit that the return of May 13, 1921, and the amendment of October 4, 1923, supported by the deputy marshal's affidavit of October 5, 1923, shows that service was made on *Miss* Thomason. But that is explained clearly in the deputy marshal's later affidavit. [Tr. 274-279] which is quoted in full in the Statement of Facts. (Brief pp. 18-22.) The clarity of that affidavit leaves no doubt of his memory of the incident. In the court below, counsel for appellee made much of the fact that at one time the deputy marshal swore he served Miss Thomason and at another time, the married daughter. But his mistake (and he says it was a mistake) is easily explainable. His mind was directed to the fact that he must serve Thomason, that the person who took the subpoena was an adult, and that she was Thomason's daughter who lived with him. He did not have in his fore-consciousness the question of Miss or Mrs. In his last affidavit [Tr. 274-279] he says May 9, 1921, instead of May 13, 1921, and defendant made much of the fact. On May 9 he received the affidavit and on May 13 he served it. The mistake is purely typographical, as appears from the rest of the affidavit.

Inconsistencies in affidavits happen to the most honest of men. We do not question the integrity of Mr. Ashburn, counsel for appellee. We do not believe he will deny that he prepared all the affidavits made by Rosamond Mildred Hunt, after talking to her, of course. In her affidavit of April 7, 1925, she says Walton "delivered to her a copy of the alias subpoena" [Tr. 158]. In her affidavit of April 26, 1925, she says she never received the subpoena, and that there was a screen door between the marshal and her. [Tr. 258, 259.] Both affidavits were made in the same month.

The deputy marshal tells a straight and convincing story. *He had no interest in lying.* And he says: *"I could without difficulty identify the person upon whom the service was made."* [Tr. 278.] *In the lower court, over and again we demanded an oral hearing.* We were willing to put Walton's statement to the test. We were willing that he should be cross-examined.

What was the attitude of appellee? Jasper Thomason was too ill. He was even too ill to make any affidavit after the first one. It seems to run in the family to have something happen, when it comes time to go on the witness stand. Mrs. Davis' husband had important business in Mexico at the time of the trial, although he was a defendant charged with dastardly crimes and frauds. He, an attorney, under such grave accusations, felt the need of the Mexican air. Jasper Thomason, also suddenly felt the need of going to parts unknown in Kern county. It seems to be a family failing.

If Thomason was ill, he could have been excused on testimony by a physician, or have awaited a continuance until he got well. He had delayed from 1921 to 1925. He might have been willing to tarry a little longer. But, no, the anxiety of awaiting a decision was killing this man who had already waited four years to move.

However, the rest of the family was not sick. Why their reluctance to submit to cross-examination if they were telling the truth? We submit with confidence that the affidavit of the deputy marshal, who had no interest in the matter, and who wanted to take the stand, is worth more than the whole sheaf of interested affidavits from this family, steeped in fraud, and avoiding cross-examination; that their reluctance to be cross-examined makes their testimony fall short of the "strongest" evidence that is necessary to overthrow a return.

Let us examine their affidavits.

Rosamond Mildred Hunt, formerly Thomason, made three affidavits. In the first one [Tr. 157, 158] she says the deputy marshal delivered her the subpoena. In the second affidavit [Tr. 258-259] she says he did not deliver her the subpoena. She also says in the second affidavit that she told the marshal her father "would probably be at home soon." [Tr. 259.] It appears that this took place in Santa Monica. In her third affidavit [Tr. 297-301], Rosamond says that her father was at the time in Antelope Valley [Tr. 298].

She also says in her third affidavit that she told the marshal that her father was out of town. [Tr. 298.] There is one thing, however, which clearly stamps her affidavits as false; she proves too much. She says she told the marshal at the time of service that she was a minor, only seventeen years old. [Tr. 259, 299.] In other words, she does not alone accuse the deputy marshal of making a mistake; she says he made a deliberately false return. This is unbelievable. The deputy marshal had no interest in the matter. He knew Thomason was evading service. Why should he play into his hands by serving Rosamond if she told him she was a minor? Will the court believe that its sworn officer deliberately made a false return in a matter in which he had no interest? The question answers itself. This departure from the truth by Rosamond (and it can be nothing else) makes her testimony entirely incredible.

Meryle Thomason Davis made three affidavits. [Tr. 253, 260, 302.] In her first affidavit, she says and attempts to show in detail how Jasper Thomason did not evade service of any subpoena, yet the deputy marshal says that three other deputies had failed to serve the subpoena *ad respondendum* on Thomason [Tr. 275]. Mr. Lewinson said he employed the Pinkerton National Detective Agency to attempt to subpoena Thomason as a witness on the trial. "Said agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process." [Tr. 250.] The same Meryle Thomason Davis, who in her affidavit shows that

Thomason did not evade service, testified at the trial that Thomason was in parts unknown of Kern county, but that she had talked to him the week before [Tr. 250, 251]. This same lady was found guilty by the court of having made a false affidavit of service on plaintiff and of other frauds. [Tr. 228.] In her next affidavit she sets forth her testimony at the trial on the subject of her sister's age. [Tr. 260-267.] She testified, as Mr. Lewinson said she did in his affidavit, as to her sister's age under examination by Mr. Lewinson, namely, that her sister was of age. That she changed her testimony after talking to her solicitor during the recess does not alter the situation.

When all of the affidavits are boiled down, the issue comes to just this. The marshal says he served the married daughter. He is willing to go on the stand and pick her out. He is willing to be cross-examined. Is the countervailing evidence strong enough to convince the court he is lying, and to cause it to overthrow his return?

Rosamond Mildred Hunt, Meryle Thomason Davis, and Mrs. Harris, their aunt, contradict the marshal. Mrs. Jasper Thomason also does in some particulars. All these witnesses are interested. Meryle Thomason Davis' affidavit, in view of the facts previously reviewed herein, is worth no more than waste paper. Rosamond's is little better.

Even though these witnesses are interested, their testimony *might be* sufficient to overthrow the return and the marshal's testimony were it not for the facts

we have pointed out and their strange reluctance to go on the stand. We call the court's attention to the repeated efforts of appellant to get an oral hearing in the lower court, and appellee's strong resistance thereto. Appellee argued that all appellant could show by cross-examination was that Thomason received notice of the suit, and that was immaterial. Counsel for appellant wished to cross-examine these witnesses to show that they were telling a tissue of lies.

We submit that the evidence is not the "strongest" evidence which is necessary to overthrow a marshal's return.

Moreover, that return certainly should not have been overthrown on affidavits. Appellant should have been given an opportunity to subject these witnesses to the acid test of cross-examination. If a return is to be overthrown by family affidavits, any dishonest family can always come in and swear a plaintiff out of court. Cross-examination, however, will usually expose the truth.

Appellee cited, in the court below, *Peper Automobile Co. v. American Motor Car etc. Co.*, 180 Fed. 245 (C. C. Mo.) as authority that appellant did not have the right to a jury trial on the question of service. We are not so contending. We maintain that in this case, where a return, perfect on its face, supported in addition by the affidavit of the deputy marshal, was sought to be overturned by the affidavits of the family of the defendant, several members of which family had been found guilty of fraud, that the plaintiff

should have had the opportunity of applying the test of rigorous cross-examination to the family testimony.

Before passing this point, one other matter may be briefly discussed. In the lower court, counsel for appellee made much capital of the fact that when Mr. Lewinson was examining Mrs. Davis at the trial, he stated Mr. Walton was in Seattle, but the same day at noon, Mr. Walton amended his return. Mr. Lewinson was so informed when he made the statement, but went into the marshal's office at noon and found Walton had returned.

We submit:

(1) That the testimony adduced to overthrow the marshal's return was not the "strongest" testimony necessary so to do.

(2) That certainly the return should not have been overthrown without an oral examination, and an opportunity for cross-examination.

III.

Even if we admit that the subpoena was delivered to Rosamond Mildred Hunt (formerly Thomason), as contended by appellee, and not to Meryle Thomason Davis, as contended by appellant, there was still a compliance with Equity Rule 13. The words "adult person" in Equity Rule 13 mean a "matured person" not a person of legal age.

Equity Rule 13 provides as follows:

> "The service of all subpoenas shall be by delivering a copy thereof to the defendant person-

> ally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."

In Rosamond Mildred Hunt's first affidavit filed with the motion to vacate, she swore that the deputy marshal delivered to her a copy of the subpoena. [Tr. 158.] In a later affidavit, she said she never received the subpoena, and that there was a screen door between the marshal and her. [Tr. 258, 259.] The deputy marshal swears positively that he delivered the affidavit to the person with whom he talked. [Tr. 276.] There is no corroboration for Rosamond's story. Mrs. Harris, her aunt, swears that from her house across the street she saw the deputy marshal talking with Rosamond, and that the screen door was closed. She says she saw the man go away, but does not say that she saw him approach, or that she "saw" the whole conversation. [Tr. 305, 306.] Moreover, she says that she did not see what the marshal did with the subpoena. [Tr. 306.] For aught that appears from her affidavit, therefore, the deputy marshal may have handed Rosamond the subpoena before Mrs. Harris began to witness the interview from across the street.

Of course, what Rosamond told Mrs. Davis and Mrs. Harris afterwards about what happened is the rankest kind of hearsay, clearly incompetent, and must be disregarded. It is a good example of testimony by affidavit.

So, as the record stands, we have only Rosamond's conflicting affidavits as to delivery against the marshal's affidavit. It needs no argument to demonstrate that a return will not be overthrown on that kind of evidence.

Moreover, the defendant's notice of motion to quash says that "the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person." [Tr. 151.] The same language is used in the motion to quash as a ground of the motion. [Tr. 236.] The words "leaving a copy" are the words of Equity Rule 13.

So it is clear on defendant's own showing that a copy of the subpoena was left with Rosamond. It is not disputed that a copy was left at the dwelling-house and usual place of abode of Jasper Thomason. It is admitted that Rosamond at the time was a member of and resident in Jasper Thomason's family. On her own statement she was seventeen years and four months old. Defendant made no attempt to show that Rosamond at the time had not arrived at maturity or that she had not attained full size and strength, and there is no evidence to that effect in the record. Defendant was content to show that Rosamond had not reached her eighteenth birthday.

Accordingly, on defendant's own showing, there was a full compliance with Equity Rule 13, if the adjective

"adult," as used in the rule, means "matured" rather than "of full age."

Webster's New International Dictionary defines the adjective "adult" as follows:

> "Having arrived at maturity, or attained full size and strength; matured; as an *adult* person or plant; an *adult* age."

Clearly the definition is with reference to the use of the adjective in Equity Rule 13; namely, "an adult person." Of course, an examination of the rule shows that the word "adult" is used as an adjective therein.

In the same dictionary, the noun "adult" is defined as follows:

> "A person, animal or plant grown to full size and strength; one who has reached maturity. In the common law the term is applied to persons of full age; in the civil law to males over the age of fourteen and to females after twelve; in the Mohammedan law of India to males or females over the age of fifteen."

It will be readily seen by reading the two definitions together, that the noun "adult" may mean either one who has reached maturity, or one of full age, but that the adjective "adult" especially when used to modify "person," means "matured" and does not mean "of full age." Since the rule says "adult person" and not "adult" it means "matured person" and not a "person of full age."

It is a well-settled principle of construction that statutes are to be construed in the light of the ends sought

to be reached. The ends sought to be reached by Equity Rule 13 are evidently (1) to provide an easier means of service than serving the defendant personally, and (2) to give the defendant notice. If the marshal must determine at his peril the age of the person served, the rule, instead of being an advantage to the suitor may be a pitfall and a snare. Moreover, a "matured person" is more likely to give notice to the defendant than a "person of full age," for the test of maturity in fact, is substituted for an arbitrary period of years.

The practical operation of the rule should also be considered. The marshal has no means of determining the age of the person served, except the statement of the person. He can see the maturity or lack of maturity of the person at a glance, and can ascertain it with certainty by a few moments conversation.

It will no doubt be argued by appellee that such a construction adopts an uncertain rather than a certain standard. But uncertain for whom? If the defendant in fact has no notice, the uncertainty for him is immaterial. He will know nothing of the suit. If he has notice, and chooses to sit by, let him risk the consequences of his gambling with the process of courts of justice. The marshal can determine in the first instance maturity more easily than age. The court can determine maturity like any other question of fact. But the defendant will say, if the age test is adopted, a man will know whether he has been served or not. The answer is that if the defendant has notice, he should come in and defend. He is in effect saying that the court should let him speculate with safety.

Moreover, the construction of a "matured person" will bring the rule into harmony with existing law. In 21 R. C. L. 1281 it is said:

> "The statutes usually require that the person with whom a copy is left, when service is made at the house or the usual abode, shall be of suitable age and discretion. The following persons have been held to come within this requirement: a child fourteen years of age; a sister of the defendant who was keeping house for him; and the wife of the defendant, although she was unable to read, write or understand English."

Counsel have searched in vain for cases construing the words "adult person" as used in Equity Rule 13, or in similar statutes. There may be such cases, but we have been unable to find them. The usual statute does not use these words. The words "adult person" appear to have been incorporated in the Federal Equity Rules in this connection in 1866. Prior to that time the term "some free white person" was used in the same connection.

Two cases illustrate the fact that the courts will interpret the rule so as to effectuate its object.

Phoenix Ins. Co. v. Wulf (C. C. Dist. of Ind.) 1 Fed. 775, was a suit in equity in which a copy of the subpoena had been left with defendant's husband in a grocery store on the ground floor of the building upon the second floor of which defendant resided. The court declared that this was proper service of process under Rule 13. The court in the course of its opinion said:

> "A copy was left with one who understood its contents, and was likely to deliver it to the person for whom it was intended. * * * Rule 13 *must receive a reasonable construction.* * * * The rule is satisfied by a service outside the dwelling-house, at the door, just as much as inside the house." (Italics ours.)

In re Risteen, 122 Fed. 732 (Dist. Ct. Mass., Judge Lowell), arose upon a plea in abatement wherein it was contended that the service of an involuntary petition in bankruptcy was insufficient. Section 18a of the Bankruptcy Act of 1898 provided that service of the petition with a writ of subpoena should be made in the same manner in which service of such process is now had upon the commencement of a suit in equity in United States courts. In other words, the Bankruptcy Act required process to be served in accordance with Equity Rule 13. The petition in this matter was against the proprietor and manager of a hotel. The copy of the writ was left with the clerk of the hotel at a time when the man against whom the petition was filed was actually in another city. The court held that Rule 13 had been complied with.

Two things are established by these cases: (1) that Rule 13 must be given a reasonable construction; and (2) that one of the purposes of Rule 13 is to insure that the copy of the subpoena be left with one who may understand its contents and is likely to deliver it to the person for whom it is intended. We do not contend that if the rule is not complied with, there is

in fact service. Notice is not service, although notice has a bearing in other connections in this case. (See Point I. B.) We do contend that the two purposes of Rule 13 are to provide an easier mode of service than personal service on the defendant, and to insure that the copy of the subpoena will be left with one who may understand its contents and is likely to deliver it to the person for whom it is intended. We further contend that the rule must be construed in the light of these purposes. The construction of "adult person" as "matured person" better effectuates these purposes than the construction "person of full age."

Blythe v. Hinckley, 84 Fed. 228 (C. C. Cal.), was relied on by defendant in the court below. There the service was made by leaving the subpoena with the wife of the brother of the deceased husband of the defendant, "who is" (to quote the words of the return) "a resident in the place of abode of Florence Blythe Hinckley, said defendant named therein." Judge Morrow said that the face of the return did not comply with Rule 13 because a "resident in the place of abode" of defendant was not a "resident of the family" of defendant. He showed that if John Smith and Sam Jones were strangers living in a large hotel, service on John Smith for Sam Jones would be service on "a resident in the place of abode" of defendant, *"with no probability whatever that it would reach the party for whom it was intended."* It will be seen that Judge Morrow likewise recognized the purpose of the rule. His reasoning is sound, and with it we have no quarrel.

Compare *In re Risteen supra* (which is entirely harmonious with *Blythe v. Hinckly*) where service on the clerk of a hotel was held to be good service on the proprietor.

In *Von Roy v. Blackman*, Fed. Cas. No. 16,997, the return showed that the service was made on a person over the age of fourteen years. The court did not notice this as affecting the service. Speaking of this decision, the author of 1 Street's Federal Equity Practice, at section 595, page 371, says:

> "The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen."

With all due deference to the learned author, we submit that he did not observe that Equity Rule 13 does not use the noun "adult," but the words "adult person." It is the noun "adult" that has the meaning "a person of full age," although it also has other meanings as "one who has reached maturity." The adjective "adult" means "matured" not "of full age." It is to be presumed that the Supreme Court of the United States uses language with precision.

Accordingly we submit that Equity Rule 13 was complied with. We do not ask the court to do violence to the language; we ask the court to give words their meaning, to assume that the Supreme Court used lan-

guage with precision. Such construction effectuates the objects of the rule, is practical, in harmony with existing law, and will make for justice.

IV.

By filing affidavits and a brief in opposition to plaintiff's motion to amend the Marshal's return nunc pro tunc, and by making an argument on the merits, in the brief, defendant Jasper Thomason made a general appearance. Thereby he cured any defects in the jurisdiction of the court over his person and made the decree a good and enforceable decree for all purposes.

A. *By filing affidavits and a brief in opposition to plaintiff's motion to amend the marshal's return nunc pro tunc, and by making an argument on the merits, defendant Jasper Thomason made a general appearance.*

While defendant's motion to quash was pending, plaintiff made an *ex parte* motion to amend the marshal's return, filing an affidavit of Walton, the deputy marshal, and a memorandum of authorities in support thereof. [Tr. 268-279.] In opposition to the application, defendant Thomason filed a brief entitled "Memorandum in Opposition to Application to Amend Marshal's Return." [Tr. 279-297.] The argument contained in the brief is in accordance with this title. The brief begins as follows:

"The application which is now made on behalf of plaintiff for an amendment *nunc pro tunc* of the mar-

shal's return of service upon the defendant Jasper Thomason contemplates the filing of a document which essentially falsifies the amended return upon which the order *pro confesso* was entered and the final decree rendered." [Tr. 279-280.]

The concluding paragraph of the brief begins as follows:

"For all of the foregoing reasons we respectfully submit to the court that the application for leave to amend the return should be denied." [Tr. 296.]

An examination of the entire argument made in the brief of defendant in opposition to the motion to amend will disclose that it admits the power of the court to grant the motion and appeals to the discretion of the court to deny it. The brief made the further argument on the merits that the amendment would prove nugatory since the decree exceeded the prayer of the bill. [Tr. 295-296.]

In addition to the brief defendant Thomason filed six affidavits in opposition to the motion to amend (which are referred to in the brief), which affidavits specifically refer to and deny the affidavit of Walton filed in support of the motion to amend. [Tr. 297-314.]

In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it?

Whatever may have been the occasion for the motion to amend the return, the fact remains that the defendant opposed it; that in so doing he expressly appealed to the court's discretion; that he made an argument on the merits; and that he filed affidavits on the facts in opposition to the motion. Suppose defendant attacked a judgment based on an insufficient complaint, and thereupon plaintiff offered to amend the complaint. No one would doubt that defendant's opposition to such a motion would constitute a general appearance. The defendant's motive for opposing the motion is immaterial; it is his opposition that counts. It does not matter why defendant became an actor in the cause; the fact is he became an actor.

Although defendant's brief and affidavits in opposition to the motion to amend were occasioned by the motion to amend, which was occasioned by the motion to quash, they were not filed in support of the motion to quash. As has been pointed out already, they purported to be and were in opposition to the motion to amend. The brief had no relation to the motion to quash. In order for defendant to succeed, it was not necessary to oppose the motion to amend. Although the amendment was allowed, the motion to quash was granted.

Moreover, counsel for defendant appealed to the discretion of the court. Discretion can only be exercised after jurisdiction is conceded. To appeal to the discretion is to admit the jurisdiction. This is fundamental. A challenge to the jurisdiction is a challenge

of the power of the court to act at all. The brief of defendant *asked* the court to deny the amendment, because on the *showing* made by *defendant* in the affidavits in opposition to the motion to amend, the court ought to exercise its *discretion* to deny the motion to amend.

What happened was that the defendant thought the exigencies of the situation demanded action, but even preliminary steps taken in answer to pressing necessity, which ask the court to take or not to take any action other than action going to the jurisdiction are held to be a general appearance.

In *Sterling Tire Corporation v. Sullivan,* 279 Fed. 336 (C. C. A. 9th Cir. on appeal from the Northern District of California) it was held that asking that a receiver's bond be made larger is a general appearance.

In *Twin Lakes Land and Water Co. v. Dohner,* 242 Fed. 399 (C. C. A. 6th Cir.), and in *Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co.,* 239 Fed. 603 (C. C. A. 7th Cir.), it was held that opposing a motion for a preliminary injunction constituted a general appearance.

In *Lively v. Picton,* 218 Fed. 401 (C. C. A. 6th Cir.), there was a dictum that a motion to set aside an order appointing a receiver is a general appearance.

These cases involved action purely on preliminary matters where the exigency was great, yet the appearances were held general.

Moreover, the defendant went one step further in this case; he contended that the motion to amend the return should not be granted because the judgment was in excess of the prayer of the complaint. [Tr. 295, 296.] This necessarily involved a consideration of the merits. In this connection the case of *Crawford v. Foster,* 84 Fed. 989 (C. C. A. 7th Cir.), is directly in point. There a motion was made by plaintiff to revive a judgment. Defendant entered a special appearance to object to the jurisdiction over the defendant's person *and because the judgment was void on its face.* The court held that such action constituted a general appearance.

Of course, the general rule that any action going to the merits, or invoking discretion constitutes a general appearance is undoubted.

Jones v. Andrews, 10 Wall. 327; 19 L. Ed. 935;

Lowry v. Tile, Mantel & Grate Association of California, 98 Fed. 817 (C. C. N. D. Cal. Judge Morrow);

Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. of App. D. of C.);

Twin Lakes Land & Water Co. v. Dohner, 242 Fed. 399, 403, 404 (C. C. A. 6th Cir.);

Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A. 7th Cir.);

Ricketts v. Bolton, 173 Ky. 739, 743, 191 S. W. 471, 473;

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500.

Is making a motion to amend a return, or opposing such a motion (for the two are on the same plane), within the rule?

Only two cases directly in point have been found, and they both hold that there is a general appearance.

Bestor v. Inter-County Fair, 135 Wis. 339, 115 N. W. 809;

Stubbs v. McGillis, 44 Colo. 138, 96 Pac. 1005, 18 L. R. A. (N. S.), 405.

In *Bestor v. Inter-County Fair,* the defendant moved to amend the return of the sheriff to speak the facts and to quash the service as insufficient. It was held that the motion to amend was a general appearance and waived the defect in service. The court said at page 809 of 115 N. W.:

> "The mere fact that the defendant stated that he appeared specially to object to the jurisdiction of the court will not protect him from the consequences of a general appearance, if the proceedings taken by him show that he appeared for any purpose consistent with jurisdiction. In the case before us the defendant moved the court to amend the return of the officer to the summons to conform to the facts. This motion was inconsistent with want of jurisdiction of the court over the person of the defendant. The court could not grant the motion without jurisdiction of the person and the subject-matter. The asking of the relief prayed for in the motion, whether granted or not, was a submission by defendant to the jurisdiction of the court and a waiver of all jurisdictional defects."

Resisting a motion is in the same category as making the motion. Thus in 4 C. J. 1334 it is said:

> "A general appearance is also made * * * by contesting or resisting a motion."

To the same effect see:

Twin Lakes Land and Water Co. v. Dohner, 242 Fed. 399 (C. C. A. 6th Cir.);

Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A. 7th Cir.);

Ricketts v. Bolton, 173 Ky. 739, 191 S. W. 471, 473;

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500.

And see cases cited under IV B and IV C *infra.*

In *Stubbs v. McGillis,* 44 Colo. 138, 96 Pac. 1005, 18 L. R. A. (N. S.) 405, a judgment by default was entered against the defendant. Thereafter the defendant petitioned (1) to vacate the judgment for lack of service, (2) to quash the return of garnishment. The plaintiff made a counter motion to amend the sheriff's return. There was an oral hearing on the motions. The defendant's motion was granted and the plaintiff's motion was denied. On appeal, the court upheld the judgment of the lower court, but said that the defendant, by opposing the motion to amend the return, made a general appearance. It therefore remanded the cause, with directions to the defendant to answer.

The point that the defendant, by opposing the motion to amend the return, made the judgment enforceable, which we will make *infra,* was not raised, and was, therefore, not before the court. An examination of the case will show that counsel made no contention on that point, evidently overlooking the large body of authority, which we shall cite *infra.* The case is, however, a direct authority to the effect that opposition to a motion to amend a sheriff's return is a general appearance.

We see then that the only two cases directly in point uphold appellant's contention. The gist of defendant's argument in the court below was that in the Federal courts the question of appearance is one of intent, and that the motion to amend was so closely connected with the motion to quash, that defendant's opposition to it did not manifest an intent to appear. We have seen, however, that defendant's brief and his argument therein were addressed solely to the discretion of the court on the question of allowing the motion to amend. We have seen that in addition he argued the merits. We have seen that he filed affidavits which he expressly stated to be in opposition to the motion to amend. That plaintiff's motion was suggested by defendant's motion can make no difference. *Stubbs v. McGillis, supra,* and *Bestor v. Inter-County Fair, supra,* are a complete answer to this argument.

In the Federal courts, as in other courts, the question of general appearance is one of intent, if the word "intent" is properly understood. By intent is not meant

what defendant means or what he says, but objective intent judged by what the defendant does.

This must be so. Otherwise, defendant could go all through a trial on the merits protesting that he appeared specially, and it would not be a general appearance. Of course this is not the law.

In the last analysis the test of intent comes to exactly the same as the other test of general appearance laid down by the cases, namely, whether defendant has asked any action on the part of the court other than to dismiss for want of jurisdiction.

The cases make clear that it is the action of the defendant that counts.

In *Wabash Western Railway v. Brow,* 164 U. S. 271, the court said, at page 278:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant *even when not in fact intended.*" (Italics ours.)

In *Edgell v. Felder,* 84 Fed. 69 (C. C. A. 5th Cir.), the court said, at page 70:

> "The appellants * * * must be held to have entered a general appearance to the bill, and thereby waived any privilege they might have had to object to being sued in the district in which the complainant resides, *although by the terms of the writing actually filed with the clerk, the appearance made was a limited appearance.*"

To the same effect is

Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429 (C. C. A. 5th Cir.)

In *Crawford v. Foster,* 84 Fed. 989 (C. C. A. 7th Cir.), the court said. at page 941:

> "It is to be observed in passing that a party cannot be both in court and out of court * * * "although called special, the first appearance of the defendant probably ought to be regarded as general. No words of reservation can make an appearance special which is in fact to the merits."

There is nothing in defendant's cases cited in the court below to the contrary. The question of intent in each case is tested by the acts done. It seems clear that this must be the law for otherwise we would have an absurdity.

In *S. P. Co. v. Arlington Heights Fruit Co.,* 191 Fed. 101 (C. C. A. 9th Cir.), in *Kelly v. T. L. Smith Co.,* 196 Fed. 466 (C. C. A. 7th Cir.), and in *Davidson Bros. Etc. v. U. S.,* 213 U. S. 10, 53 L. Ed. 675, the defendant appeared specially and objected to the jurisdiction of the court both over the person and of the subject matter. The court in each instance held the appearance to be special since the challenge was only to the jurisdiction. An examination of the cases will disclose that the holding was based on the fact that there was no other action taken than a challenge to the jurisdiction of the court.

In *S. P. Co. v. Arlington Heights Fruit Co.* the court said at page 110:

> "In the case at bar all three of the grounds assigned by the plea went to the jurisdiction of the court in one sense—the first to the jurisdiction over the person, and the last two to the jurisdiction of the court as a court of equity."

And in the same case the court cited with approval at page 106 the case of *St. Louis etc. Railway Co. v. McBride,* 141 U. S. 127, where the attack was not alone on the question of jurisdiction of the court and the appearance was held to be general.

In *Kelly v. T. L. Smith Co.* the court said at page 469:

> "Clearly the intent was to urge only objections to jurisdiction."

In *Davidson Bros. etc. v. U. S.* the point chiefly discussed was as to the validity of a rule of the Circuit Court holding that defendant must agree to appear generally or the special appearance of defendant would be converted into a general appearance. The court held that the rule was invalid. The case involved a holding, however, though the point was not directly discussed, that a challenge to the jurisdiction over the person and of the subject matter is a special appearance. At page 19 the court said:

> "The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction."

It will be seen, therefore, that these cases rest on the proposition that the appearance was solely to object to the jurisdiction of the court. That being so, they are in no wise contrary to the proposition contended for by the plaintiff. Here the action of the court invoked was discretionary and, as has been pointed out, the court could only exercise discretion after it had jurisdiction. Moreover, in the case at bar, defendant made an argument on the merits. We submit, therefore, that these cases are not authorities against the plaintiff. They were not intended to conflict with cases of the type of *Jones v. Andrews,* 10 Wall. 327, 19 L. Ed. 935, where it was held that a motion to dismiss on the ground of (1) no jurisdiction over the person, and (2) a want of equity in the bill is a general appearance. So here the action of the court sought to be invoked by the defendant did not relate solely to the jurisdiction of the court, and accordingly the appearance was general.

In *Wood v. Wilbert's Sons etc.,* 226 U. S. 384, 57 L. Ed. 265, no point as to appearance was passed on by the court, because the ruling on the question was not assigned as error. The court said as to the question of appearance at page 386: "The ruling is not assigned as error." Nothing, therefore, is decided by this case on the point of appearance.

In *Grable v. Killits,* 282 Fed. 195 (C. C. A., 6th Cir.), there was a special appearance and a motion to set aside the service of process and several orders

based on that service, among them orders for a temporary injunction, receivership, etc. It was held that the defect only applied to part of the orders and that they should be set aside. The fact that the motion attempted to set aside for want of jurisdiction other orders did not convert the appearance into a general appearance, nor did a motion of the defendants to amend their motion to set aside the service by inserting the name of another defendant make it a general appearance.

There is nothing in this case in conflict with the position of the plaintiff. Clearly the fact that several orders were attacked for want of jurisdiction and only some of them were set aside did not make the appearance general. The only attack was on the jurisdiction of the court. That that attack was unsuccessful in part did not change it into an attack on anything else but the jurisdiction. Moreover, it is quite clear that the amendment of the defendants of their motion attacking the jurisdiction of the court was not a general appearance. It would be just as if the defendant here had amended their motion to quash by inserting some words. If the motion was not a general appearance, of course the amendment to the motion likewise would not be a general appearance. We submit that the case is not in point.

In *Dahlgren v. Pierce,* 263 Fed. 841, defendants' counsel, while arguing a motion to vacate the service for want of jurisdiction, made some arguments as to the merits of the bill. The court held there was no

general appearance. The court said that the argument was unimportant because no action of the court was sought to be invoked thereby. There was nothing before the court on which the court could take action, except the motion to vacate for want of jurisdiction. The court said at page 846:

> "We come, then, to the result of the conduct of petitioner's counsel in arguing, also, that the motion to vacate ought to be granted, because the bill was not good and should be dismissed. If a motion to dismiss had been made upon these grounds before the motion to vacate had been passed upon, it might well have been a waiver; but it will be noticed that petitioner had then never asked any relief, except that the motion to vacate should be granted. The written brief and argument, which the district judge found to be equivalent to a general appearance, concluded: 'We respectfully submit that the order should be set aside.' There was then no other issue, either of law or of fact."

The case is distinguishable from the case at bar in that there the argument made asked no action of the court. The only thing before the court was the motion to vacate the service. Here there was before the court another motion, namely, the motion to amend the return to which the argument on the merits was directed. The court clearly indicated that in such a situation, the appearance would be general. The point on which the whole case turned was the fact that nothing was sought by the argument.

Here something was sought by the argument. The court cited with approval *Jones v. Andrews,* 10 Wall. 327, 19 L. Ed. 935, *supra.*

We should again like to call the court's attention to the argument on the merits made by the defendant in this case *in support of the defendant's opposition to the motion to amend.* We submit that the foregoing case impliedly is an authority that such an argument directed to a pending motion is a general appearance, and in this connection we again call attention to *Crawford v. Foster,* 84 Fed. 989 (C. C. A., 7th Cir.).

In *Salmon Falls Mfg. Co. v. Midland Tire & R. Co.,* 285 Fed. 215 (C. C. A., 6th Cir.), there was an attachment suit against a non-resident defendant. The defendant appeared and objected on jurisdictional grounds and at the same time pleaded its defense to the merits but only in so far as the attached property was concerned. The appearance was held special, except as to the attached property. This is clearly right. The cases all hold that in an attachment suit against a non-resident defendant, he can defend his property over which the court has jurisdiction to the limit without submitting his person to the court. To hold otherwise would deprive the defendant of his property without giving him a chance to defend. If the case proves anything else than this, it proves too much, for it proves that a defendant could answer at the same time

that he objects to the jurisdiction without making a general appearance. This, of course, is not the law.

Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935;
Lowry v. Tile, Mantel & Grate Association of California, 98 Fed. 817 (C. C., N. D., Cal., Judge Morrow);
Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. of App., D. of C.).

In *Genl. Inv. Co. v. Lake Shore etc. Co.,* 260 U. S. 261, 67 L. Ed. 244, it was held:

(a) That a removal petition is not a general appearance. This is clear law supported by all the cases, the reason being that to hold otherwise would deprive the defendants of a substantial right given by statute, namely, the right to remove to the federal court, and for the further reason that as to the defendant, the proceeding in the federal court is a proceeding *de novo.*

(b) That a stipulation that testimony taken in the state court on the question of jurisdiction over the person of the defendants could be used in the federal court on the same question was not a general appearance. This also seems quite clear. The stipulation brought before the court the testimony directed to the question of jurisdiction over the person of the defendant. It is just as though the court had ordered an oral hearing in this case on the motion to quash the return and the defendant had offered testimony. Of course, that would not be a general appearance.

(c) That signing a brief "Solicitors for Defendants" was not a general appearance when the brief showed in many places that it was filed only on behalf of one defendant and stated that the other parties were not now defendants, their objections to the jurisdiction having been sustained. This seems clearly right. The addition of the "s," in view of all the rest of the brief, was clearly not an appearance for the other defendants when the brief stated that they were not in the case.

We submit that there is nothing in the case that makes it contrary to the contention of plaintiff in the case at bar.

Pine Hill Coal Co. v. Gusicki, 261 Fed. 974, and *Yanuszankas v. Mallory S. S. Co.,* 232 Fed. 132, are two cases in the Circuit Court of Appeals for the Second Circuit holding that obtaining an order extending time is not a general appearance. This is a question on which there is much difference of opinion. See to the contrary:

Everett Ry. Light & Power Co. v. U. S., 236 Fed. 806 (D. C., Wash.);

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 (C. C., Nev., Judge Van Fleet);

Briggs v. Stroud, 58 Fed. 717 (C. C., E. D., Wis.);

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659 (D. C., Ore., citing several federal authorities);

Placek v. American Life Ins. Co., 288 Fed. 987 (D. C., Wash.).

Without attempting to decide which set of authorities is correct, it is plain that the situation is not analogous to the case at bar. An extension of time is simply holding the situation in *statu quo*. It involves no action in the case one way or the other. It would seem, therefore, that the cases are not in point here.

On the same question of obtaining time to plead, defendant in the court below cited *Davenport v. Superior Court*, 183 Cal. 506. Appearance in California is governed by section 1014 of the Code of Civil Procedure which provides that: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance for him." The court held that obtaining an order extending time was not a general appearance. But the court expressly recognized the authority of cases holding that entering into a stipulation giving additional time to plead was a general appearance.

Zobel v. Zobel, 151 Cal. 98, holds that asking a continuance of hearing on a motion amounts to a general appearance. It has never been overruled. This delightfully logical state of the California law, originating from the peculiar section 1014, can render this Court but little help in solving the problem here presented. Appellee argued also in the court below that another point involving an appeal to discretion was decided by the *Davenport* case. We cannot find it in the case.

In *Garvey v. Compania Metalurgica Mexicana*, 222 Fed. 732 (W. D., Tex.), it was held that a deposition

taken in support of a motion to quash for want of jurisdiction is not a general appearance. This seems quite clear also. It is just as though the defendant had produced testimony on the hearing of his motion to quash. Of course, this would not be a general appearance. It is simply proving that the facts set forth in the motion are true, and the testimony is directed only to the jurisdiction of the court. This case likewise is not in point.

We submit that the action of the defendant in opposing the motion to amend was a general appearance because it invoked the action of the court on a question that was not one of jurisdiction; because it appealed to the discretion of the court and discretion is fundamentally opposed to lack of jurisdiction; and because it argued the merits of the case on a pending motion before the court not directed to the jurisdiction.

B. *Where, as in this case, defendant makes a special appearance to object to the jurisdiction, as for instance a motion to quash service, and pending decision on the motion, he does something which amounts to a general appearance, his objections to the jurisdiction are waived, and his motion will be denied.*

This point was not contested by the defendant in the lower court, and will not be argued at length. The authorities uniformly uphold the proposition stated.

Yale v. Edgerton, 11 Minn. 271, Gil. 184;

New Albany & S. R. Co. v. Combs, 13 Ind. 490;

Barnes v. Western U. Tel. Co., 120 Fed. 550;

Grizzard v. Brown, 2 Tex. Civ. App. 584, 22 S. W. 252;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144 (C. C. A., 8th Cir.).

In passing it may be well to note one distinction. Where the defendant makes a special appearance to object to the jurisdiction of the court over his person, and the objection is overruled, and he then makes a general appearance, the authorities are divided as to whether he waives the lack of jurisdiction over his person. (4 C. J. 1365-1367.) Where, as in this case, he makes a special appearance to object to the jurisdiction, and before decision on the subject, does something amounting to a general appearance, all the authorities agree that there is a waiver.

C. *The fact that the general appearance is made after decree instead of before is immaterial. It cures any defects in the jurisdiction of the court over the person of the defendant and the decree is a good and enforceable decree for all purposes.*

This point was not contested by the defendant in the court below. The authorities uniformly sustain it. In order to avoid lengthening a brief already too long we shall cite the authorities without argument.

Ann. Cas., 1914 C, 694, note;

4 *C. J.,* 1364, 1365;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

Sugg v. Thornton, 132 U. S. 524, 530;

Security Loan and Trust Co. v. Boston etc. Co., 126 Cal. 418;

Willett v. Blake, 134 Pac. 1109 (Sup. Ct., Okla.);

Johnson Loan and Trust Co. v. Burr, 51 Pac. 916 (Ct. App. of Kan.);

Boulder Colorado Sanitarium v. Vanston, 94 Pac. 945 (Sup. Ct. of N. M.);

Crowell v. Kopp, 189 Pac. 652 (N. M. Sup.);

Jackson v. Lebanon Reservoir and Ditch Co., 171 Pac. 997 (Ariz. Sup.);

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;

Barba v. People, 18 Colo. App. 16;

Ryan v. Driscoll, 83 Ill. 415;

McCarthy v. McCarthy, 66 Ind. 128;

Balfe v. Rumsey etc. Co., 55 Colo. 97, 133 Pac. 417;

Pry v. Hannibal and St. Joseph R. R. Co., 73 Mo. 123;

Tisdale v. Rider, 104 N. Y. S. 77;

Borough of Jeannette v. Roehme, 47 Atl. 283 (Sup. Ct. of Pa.);

Nelson v. Nebraska Loan and Trust Co., 87 N. W. 320, (Sup. Ct. of Neb.);

Nebraska Loan and Trust Co. v. Kroener, 88 N. W. 499 (Sup. Ct. of Neb.).

Barnett v. Holyoke Mutual Fire Ins. Co., 97 Pac. 962 (Sup. Ct. of Kan.);

Clarkson v. Washington, 131 Pac. 935 (Sup. Ct. of Okla.)

Accordingly, we submit:

1. That the opposition of the defendant Thomason to the motion to amend constituted a general appearance.

2. That such general appearance cured any defects in the service, and made the decree good and valid for all purposes.

Conclusion.

In the court below defendant protested much about the great injustice that was being done him by denying him his day in court. It is quite clear, however, that Thomason is not seeking his day in court, for he does not ask leave to defend. He makes no showing, or even statement, that he has a meritorious defense. He had full notice of this suit and defended in effect through the other members of his family, who were defendants as well. He chose to stand by and gamble with the result. Now he seeks to have this court of equity place the shield of the statute of limitations between him and the justice which has been delayed too long, to make him secure in the fruits of his fraud. We submit that neither on strict rules of law nor on broad principles of equity is the defendant entitled to succeed in this attempt.

Respectfully submitted,

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